No. 99-603-CFX Title: Legal Services Corporation, Petitioner
v.
Carmen Velazquez, et al.

Docketed: October 7, 1999 Court: United States Court of Appeals for the Second Circuit

Vide:
99-960

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Oct 6 1999 | Petition for writ of certiorari filed. (Response due December 8, 1999) |
| | Nov 1 1999 | Waiver of right of respondents Carmen Velazquez, et al. to respond filed. |
| | Nov 4 1999 | Order extending time to file response to petition until December 8, 1999. |
| | Nov 4 1999 | This extension is granted for all respondents. |
| | Jan 19 2000 | DISTRIBUTED for Conference of February 18, 2000 |
| | Jan 31 2000 | Response requested. |
| | Mar 1 2000 | Brief of respondents Carmen Velazquez, et al. in opposition filed. |
| | Mar 14 2000 | Reply brief of petitioner Legal Services Corporation filed. |
| | Mar 15 2000 | REDISTRIBUTED for Conference of March 31, 2000 |
| | Apr 3 2000 | Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT October 4, 2000. |
| | | ********** |
| | Apr 18 2000 | Order extending time to file petitioner's brief on the merits to and including June 9, 2000. |
| | Jun 5 2000 | Brief amicus curiae of Pacific Legal Foundation filed. VIDED. |
| | Jun 8 2000 | Order further extending time to file petitioner's brief on the merits to and including Tuesday, June 13, 2000. |
| | Jun 9 2000 | Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED. |
| | Jun 13 2000 | Joint appendix filed. VIDED. |
| | Jun 13 2000 | Brief of petitioner Legal Services Corporation filed. VIDED. |
| | Jun 13 2000 | Brief of petitioner United States filed. VIDED. |
| | Jul 10 2000 | Order extending time to file respondents' brief on the merits to and including July 17, 2000. |
| | Jul 17 2000 | Brief of respondents Carmen Velazquez, et al. filed. VIDED. |
| | Jul 17 2000 | Brief amicus curiae of American Judicature Society filed. VIDED. |
| | Jul 17 2000 | Brief amici curiae of New York Bar Association, et al. filed. VIDED. |
| | Jul 17 2000 | Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. |
| | Aug 1 2000 | Motion of the Solicitor General for divided argument filed. |
| | Aug 14 2000 | CIRCULATED. |
| | Aug 17 2000 | Reply brief of petitioner Legal Services Corporation filed. VIDED. |
| | Aug 18 2000 | Reply brief of petitioner United States filed. VIDED. |

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No. 99-603-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Aug 28 2000 | Motion of the Solicitor General for divided argument GRANTED. |
| | Aug 30 2000 | Record filed. |
| | Aug 30 2000 | Record filed. |
| | Oct 4 2000 | ARGUED. |

No. __-____ (1) 99 603 FILED OCT - 6 1999

IN THE OFFICE OF THE CLERK

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner,*

UNITED STATES OF AMERICA,

*Intervenor,*

—v.—

CARMEN VELAZQUEZ; WEP WORKERS TOGETHER!; COMMUNITY SERVICE SOCIETY OF NEW YORK, INC.; NEW YORK CITY COALITION TO END LEAD POISONING; CENTRO INDEPENDIENTE

*(Caption continued on inside front cover)*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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160 pp

DE TRABAJADORES AGRICOLAS, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208; FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208; PEGGY EARISMAN; OLIVE KAREN STAMM; JEANETTE ZELHOF; ELISABETH BENJAMIN; JILL ANN BOSKEY; LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and; ANDREW J. CONNICK; C. VIRGINIA FIELDS, Manhattan Borough President; GUILLERMO LINARES, Councilmember; STANLEY MICHELS, Councilmember; ADAM CLAYTON POWELL, JR. IV, Councilmember; LAWRENCE SEABROOK, Senator; SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

*Respondents.*

## QUESTION PRESENTED

Whether the court of appeals erred in refusing to follow this Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1990) when it invalidated a limitation imposed by Congress on the services that may be provided by Legal Services Corporation grantees and held that Congress must subsidize grantees involved in litigation that seeks to amend or otherwise challenges existing welfare laws.

## PARTIES TO THE PROCEEDING

Petitioner is the Legal Services Corporation. Pursuant to Supreme Court Rule 14.1(b), a complete list of respondents is contained in the caption of this case.

## RULE 29.6

Legal Service Corporation has no parent companies or non-wholly owned subsidiaries.

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IN THE

# Supreme Court of the United States

**No. 99-____**

LEGAL SERVICES CORPORATION,

*Petitioner,*

UNITED STATES OF AMERICA,

*Intervenor,*

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Legal Services Corporation hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 164 F.3d 757 (2d Cir. 1999), and is set forth in the Appendix ("App.") at App. 1a-41a. The order of the court of appeals denying the petitions for rehearing is dated July 8, 1999 and is set forth at

App. 42a-43a. The opinion of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction is reported at 985 F. Supp. 323 (E.D.N.Y. 1997), and is set forth at App. 44a-84a.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999 and denied the petitions for rehearing on July 8, 1999. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment I;
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321;
3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009;
4. Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, 111 Stat. 2440; and
5. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 45 C.F.R. Part 1610.

## STATEMENT OF THE CASE

By a two-to-one vote, the Second Circuit held that a provision of the Legal Services Corporation enabling statute, as

amended in 1996, was unconstitutional. In doing so, the court failed to follow this Court's teaching in *Rust v. Sullivan*, 500 U.S. 173 (1990), and created a conflict with the Ninth Circuit, which in a unanimous ruling affirmed the constitutionality of all the statute's recently amended provisions. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998). In all other respects the Second Circuit rejected the challenge to the statute. This petition concerns the court's ruling with respect to the sole provision—a narrow but important one—that it invalidated: whether Congress is obligated to fund broad based lawsuits to reform the welfare laws on constitutional grounds in addition to funding specific legal services designed to obtain welfare payments for indigents under existing law. To properly understand the reasons the petition should be granted, the following background concerning the history of the Legal Services program and this litigation is necessary.

## A. The History And Purpose Of The LSC Program

Congress created the Legal Services Corporation ("LSC") in 1974 as an independent, non-profit corporation whose purpose was to provide basic legal services to the poor. Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)) (the "LSC Act"). The history of the program makes certain things abundantly clear.

*First*, Congress intended that the program it created would operate as a subsidy program that would use both federal money and funds from other sources to carry out its mission. Every year, LSC distributes funds appropriated by Congress to local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a). However, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. JA 297 (¶ 4); JA 225 (¶ 14).[1]

[1] Citations to "JA" are to the Joint Appendix submitted in connection with the appeal below.

*Second*, Congress viewed a primary purpose of the program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310 at 34 (1977) (views of Rep. McClory). As one Member of the House stated, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2] Thus, Congress intended the program to emphasize individual cases in areas such as consumer and family law, and housing.[3] The primary focus continues to be on "bread-and-butter services." 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen).

*Third*, to maintain this focus, Congress took a variety of steps to further its mandate that "[t]he legal services program must be kept free from the influence of or use by it of political pressures." 42 U.S.C. § 2996(5). For example, the LSC Act barred political activity by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Other provisions were designed to keep LSC clear of politically controversial topics.

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[2] *See also* 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter).

[3] *See* S. Rep. No. 95-172 at 3 (1977) ("Most of the legal problems of eligible clients fall into four broad categories: family law; administrative benefits, including medicaid, AFDC, and SSI; consumer law; and housing law.") This focus on the daily needs of the individual poor continued in the debates concerning the restrictions that were added in the 1996 and 1997 Acts. *See, e.g*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

For example, the statute barred LSC grantees from participating in litigation concerning school desegregation, abortion, and "draft dodgers." *Id.* §§ 2996f(b)(8)-(10). It also prohibited most criminal representation and strictly limited civil representation of prisoners, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5) and 2996f(b)(1)-(4). Most of these restrictions applied even if the activities were funded by private donors. *Id.* § 2996i(c) *See also* JA 297-298 (¶¶ 3-8).[4]

Congress believed that these restrictions on the activities LSC lawyers could engage in were necessary to achieve its goal of keeping LSC apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310 at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office). Additional restrictions promulgated by LSC were upheld as implementing the statutory mandate to avoid politically controversial issues. *Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (regulation barring redistricting activities).

### B. The 1996 Compromise Concerning LSC

Over time, LSC came under attack from various quarters. App. 48a-49a. The pressures increased in 1995 and 1996, as a result of budget constraints and the perception by some members of Congress that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995). Some critics of LSC attempted to eliminate it entirely. Those efforts were rejected in favor of compromise legislation supported by Representative Rogers and Senator Domenici that was incorporated in the 1996

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[4] *See also* S. Rep. No. 95-172 at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources as those that are imposed on funds received from [LSC]"); 45 C.F.R. Parts 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

Omnibus Appropriations Act, Pub. L. No. 104-34, 110 Stat. 1321 (the "1996 Act").[5] That compromise reduced LSC's appropriation, provided for additional subject matter restrictions, and extended the restrictions to cover *all* funds of LSC grantees. Congress made clear that the purpose of the restrictions was to refocus LSC on its original mission and "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens). *See also* S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)).

The Congressional debates make clear that the restrictions in the 1996 Act were an effort to save LSC and preserve its original focus and mission, not to eliminate the program. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions, they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996).[6]

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[5] The restrictions at issue here were continued in subsequent legislation in 1997 (Pub. L. 104-208, 110 Stat. 3009) and 1998 (Pub. L. 105-119, 111 Stat. 2440). (the "1997 and 1998 Acts"). Accordingly, for ease of reference, we will hereinafter only refer to the 1996 Act. The relevant portions of each statute are set forth in the Appendix at 85a-111a.

[6] *See also* 141 Cong. Rec. S14607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded") (Sen. Lautenberg); S14612 ("[S]ome restrictions are necessary to ensure support for the program . . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work") (Sen. Kennedy).

### C. The Restrictions At Issue

The restrictions in the 1996 Act that Respondents sought to enjoin can be divided into three groups:

*First*, LSC may not provide funds to entities that litigate on behalf of certain aliens and incarcerated persons, or to entities that solicit clients in person to represent them for any purpose. 1996 Act §§ 504(a)(11), (15) and (18) ("representation restrictions").

*Second*, LSC may not provide funds to entities engaged in class action litigation or cases in which attorneys' fees are sought. *Id.* §§ 504(a)(7) and (13); 45 C.F.R. Parts 1617 and 1642 ("procedural restrictions").

*Third*, LSC cannot fund entities involved in efforts to influence executive orders and regulations, agency policies of general applicability and future effect, legislation, constitutional amendments, referenda, or initiatives. *Id.* §§ 504(a)(2)-(4) ("advocacy restrictions"). Grantee attorneys may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare system), to respond to written requests for information from agencies or legislative bodies, or to lobby for funding of the grantee organization itself. 45 C.F.R. 1612.6(a), (e) and (f).

Included in this third category is a limitation in section 504(a)(16) of the 1996 Act prohibiting LSC-funded lawyers from participating in litigation, lobbying, or rulemaking "involving an effort to reform a Federal or State welfare system." This section further provides an exception to this limitation and *permits* an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* Thus, LSC- funded lawyers may represent clients seeking welfare benefits if the representation does not involve a challenge to the welfare reform

law[7] as it exists at the time the representation is undertaken (the "suit-for-benefits limitation"). *The suit-for-benefits limitation is the only restriction in the 1996 Act that is at issue in this petition.*

The 1996 Act also provides that these restrictions apply to all of an LSC grantee's funds, and to any entity receiving a transfer of LSC funds. 1996 Act § 504(d); 61 Fed. Reg. 63749-54 (Dec. 2, 1996). Previously, the restrictions applied to a grantee's LSC funds, and in some cases, private funds as well, but not to a grantee's public funds.

Under the rules, if an attorney in an LSC-funded program determines that a strategy that they may not pursue is in the client's best interest, they can refer the client to an organization not covered by the limitations. App. 65a-66a and 82a. Individual full time employees are free to engage in the restricted "advocacy" activities in their individual capacity and on their own time. Finally, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations that are financially and physically separate from the grantee. JA 294-295.

### D. LSC's Program-Integrity Regulations

Shortly after the passage of the 1996 Act, LSC began drafting implementing rules and solicited comments on several interim rules. At that time, LSC's policy did not allow any entity under the effective control of an LSC grantee to engage in prohibited activities. Whether an organization was "effectively controlled" by a grantee was determined based on an "interrelated organizations" test which considered the presence of interlocking directors, shared funding, and other similar factors. JA 324 (¶¶ 14-15) and JA 360-362.

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[7] LSC's implementing regulations state that the limitations in section 504(a)(16) only apply to the federal welfare reform law passed in 1996 and subsequent implementing laws and regulations. *See* 45 C.F.R. § 1639.2(a) (1998).

LSC grantees were required to disengage themselves from most pending restricted matters and to close or otherwise transfer pending class actions and matters involving prisoners and aliens by August 1, 1996. Between enactment of the 1996 Act and August 1, 1996, many cases were settled or otherwise terminated. Where cases were not terminated, recipients were required to either locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer open matters consistent with their professional responsibilities to their clients. JA 320-321 (¶¶ 3-5).

### E. The District Court Litigation

On January 27, 1997, Respondents moved to preliminarily enjoin the restrictions described above on the grounds that, *inter alia*, they violated the First Amendment. Several weeks earlier, a similar action had been brought in the United States District Court for the District of Hawaii. Before briefing in the instant action was completed, that court granted in part and denied in part the request for a preliminary injunction in the action before it. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402 (D. Haw. 1997) (*"LASH I"*). The court found that the plaintiffs had a fair likelihood of showing that LSC regulations then in effect, as they related to most of the restricted activities, violated the unconstitutional conditions doctrine because LSC's "interrelated organizations" rule failed to provide the adequate alternative channels of expression required by this Court in its decisions in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Rust v. Sullivan*, 500 U.S. 173 (1990). The court also concluded that restrictions on class actions, claims for attorneys' fees, and representation of ineligible aliens did not implicate any constitutional rights, and denied the motion as to those restrictions. *LASH I*, 961 F. Supp. at 1410-1411.

In response, LSC reviewed and modified its implementing rules to address the concerns raised in *LASH I*. Interim rules were published in the Federal Register on March 14, 1997. These rules, which were in effect when district court heard argument on Respondents' motion, eliminated the restrictions on transfers of non-LSC funds and created an alternative avenue for expression through "interrelated organizations" that were "physically and financially" separate from LSC recipients. JA 322-324 and 356-359. The physical and financial separation requirements were modeled after the regulations upheld in *Rust*. JA 495 and 507. However, as the district court observed, there were still differences between the LSC regulations and those at issue in *Rust*. App. 61a-63a.

After receiving comments on the new interim rule, on May 21, 1997 LSC revised and issued the final "program integrity" regulations at issue here. 45 C.F.R. Part 1610.[8] The revised regulations eliminated the "interrelated organizations" test completely, and removed minor variations in wording between the LSC (interim) rule and the regulations approved by this Court in *Rust*.

On December 22, 1997, the district court denied the motion for a preliminary injunction. App. 44a-84a. It concluded that the regulations constituted a permissible attempt by LSC to guard against the appearance that Congress was supporting the prohibited activities, and rejected Respondents' contention that they were void-for-vagueness or overbroad. Relying on *Rust*, the court also found that the restrictions did not significantly impinge upon any First Amendment rights. It also rejected Respondents' claim that doctors and lawyers in federally subsidized programs are somehow different.

In concluding that the program integrity regulations were constitutional under *Rust*, the district court reached the same conclusion as the federal court in Hawaii, which, after considering the impact of the final rules on its initial ruling, dis-

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[8] These regulations are set forth at App. 112a-132a.

solved its earlier injunction and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) (*"LASH II"*). That decision was affirmed by the Court of Appeals for the Ninth Circuit. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied* 119 S. Ct. 539 (1998) (*"LASH III"*).

### F. The Court of Appeals' Decision

On appeal, the court of appeals for the Second Circuit unanimously affirmed the lower court's ruling in all but one respect. Relying on this Court's decisions in *Regan*, *League of Women Voters*, and *Rust*, the court held that the 1996 Act did *not* impermissibly condition the receipt of a government benefit on the relinquishment of First Amendment rights because LSC's program-integrity rules provided adequate alternative channels for the exercise of those rights. It also rejected the claim that the relationship between LSC-funded lawyers and their clients was entitled to more protection than the doctor-patient relationship in *Rust*:

> [T]he lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. . . . .
>
> * * * *
>
> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

App. 14a-15a.

Two members of the panel, however, held that the suit-for-benefits limitation contained in section 504(a)(16) of the 1996 Act was unconstitutional. As described above, this section prohibits LSC-funded lawyers from participating in litigation, lobbying, or rulemaking "involving an effort to reform a

Federal or State welfare system." The panel upheld the constitutionality of this limitation. However, the section also provides an exception to this limitation and permits an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* Thus, LSC-funded lawyers may represent clients seeking welfare benefits provided the representation does not involve a challenge to the welfare reform law as it exists at the time the representation is undertaken.

The majority held that the suit-for-benefits limitation constituted unlawful viewpoint-based discrimination and violated the free speech clause of the First Amendment. App. 23a-29a. The majority's conclusion was based on its belief that (a) *Rust* could not be taken at face value and (b) the government's ability to selectively subsidize services in its own programs is more limited when lawyers, and not doctors, are the ones providing services.[9]

The third member of the panel argued that *Rust* applied with full force, and that under *Rust* this limitation was a lawful exercise of the government's right to require federally subsidized service providers to "get with its program." App. 31a-41a.

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[9] As we note below, to the extent the majority may also have relied on *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), its reliance was misplaced.

## REASONS FOR GRANTING THE PETITION

### THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' INVALIDATION OF THE SUIT-FOR-BENEFITS LIMITATION CONFLICTS WITH RUST AND THE NINTH CIRCUIT'S DECISION IN LASH III

This case involves the government's power to define the scope of services provided in federally subsidized programs. In *Rust*, this Court held that in creating and subsidizing a program to provide services to the indigent, Congress may choose to subsidize (or not subsidize) various points of view without violating the First Amendment. That part of the decision which invalidated the suit-for-benefits limitation conflicts with *Rust* and the Ninth Circuit's decision in *LASH III*.

#### A. The Panel's Ruling Conflicts With Rust

##### 1. The Decision In Rust

*Rust* involved a challenge to a section of the Public Health Services Act prohibiting the use of funds appropriated for family-planning services in programs where abortion was a method of family planning and the regulations promulgated thereunder. The limitations in *Rust* imposed a "gag rule" on doctors. If a pregnant woman consulted a doctor in a Title X clinic, the doctor could not talk to her about abortion, either to advise her that abortion was an alternative she could consider or to refer her to a doctor who was not federally subsidized and thus free to discuss that option with her. 42 C.F.R. §§ 59.8(a) (1)-(2) and (5). Thus, the limitations in *Rust* prevented the doctor from (a) giving the patient complete advice with respect to her health care options, (b) informing her of an option that was her constitutional right, and (c) even disclosing the fact that the rules required the doctor to give one-sided advice.

The statute and regulations were challenged as, among other things, violative of the free speech clause of the First Amendment. The district court rejected these challenges and held that "[t]he condition that federal funds be given only to those who support particular views does not violate constitutional rights. . . . The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech." *State of New York v. Bowen*, 690 F. Supp. 1261, 1273-74 (S.D.N.Y. 1988) (citation omitted).

The court of appeals affirmed. It too rejected the free speech argument:

> [T]he Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women. The Court has extended the doctrine that government need not subsidize the exercise of fundamental rights to speech rights. In *Regan* . . . [the Court] *again* noted that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

*State of New York v. Sullivan*, 889 F.2d at 401, 412 (2d Cir. 1989) (emphasis added).

Before this Court, the petitioners again argued that the statute and regulations "impermissibly impos[ed] 'viewpoint-discriminatory conditions on government subsidies.' " *Rust*, 500 U.S. at 192 (quoting Petitioners' Brief). This argument was rejected yet again:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in

> the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.*
> . . .

*Rust*, 500 U.S. at 192-193 (emphasis added) (citations omitted).

*Rust* makes clear that the government's decision to selectively subsidize activities within a program it creates is *not* unlawful viewpoint discrimination. In *Rust*, Congress subsidized certain family planning speech but refused to subsidize family planning speech relating to abortion. Here, Congress will pay for certain legal services for the indigent but not for other services, such as challenges to welfare reform laws.

Moreover, the limitation here is far less viewpoint-skewed than the rule approved in *Rust*. Unlike the doctors in *Rust*, there is no "gag rule" on LSC-funded lawyers. They can advise a person seeking to obtain welfare benefits that the person may have a claim that a welfare reform law is unlawful but that they will be unable to raise the claim on behalf of the person. The LSC-funded lawyers can also refer the person to a lawyer who can make the argument, including a lawyer working for an affiliate of an LSC grantee that meets the program integrity requirements. The rules this Court approved in *Rust*, on the other hand, prevented a woman from getting similar information about her right to abortion and left her far less informed (and perhaps even misinformed) about her rights than the prospective clients here and were therefore more likely to "drive certain ideas or viewpoints from the marketplace" (App. 28a) than the limitation at issue here. Under *Rust*, the suit-for-benefits limitation is constitutional.

### 2. Rust Applies To This Case

The court of appeals recognized that *Rust* "seem[s] on [its] face to support [the] view" that the suit-for-benefits limitation

is constitutional. App. 25a. It nevertheless refused to apply *Rust*, because of its "doubt that these words can reliably be taken at face value." *Id.*

The critical paragraph in *Rust* was not, as the court of appeals characterized it, "explanatory language." App. 25a. It was this Court's answer to the question of whether the refusal to subsidize a given viewpoint in connection with a government services program violates the First Amendment. The answer was—and is—no. Indeed, the centrality of this paragraph to the holding in *Rust*, and its continuing vitality, was reaffirmed in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998), where this Court cited it in applying the rule that subsidization of speech in a government program is not governed by the same rules as direct regulation of speech and does not constitute unlawful viewpoint discrimination.

Nor can *Rust* be dismissed as "a judicial precedent in a relatively unexplored area of the law." App. 25a. In *Rust*, this Court simply applied its precedents on the issue of government subsidies. Thus, in rejecting petitioners' viewpoint argument, this Court cited its decisions in, among other cases, *Regan*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right") and *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.")

In sum, as the dissenting member of the panel concluded, there is no reason to doubt that this Court "meant what it said in *Rust* and *Finley*" (App. 38a), and that its holding on selective subsidization applies with equal force here.

### 3. The Speech Here Is Not Entitled To More Protection Than The Speech In Rust

In refusing to follow *Rust*, the court of appeals also reasoned that the speech here is entitled to more First Amendment protection than the speech restricted in *Rust*:

> In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art.

App. 27a.

There are two errors in this attempt to distinguish *Rust*. *First*, it places undue emphasis on the role of the lawyer. Like the doctor in the Title X program, a lawyer in the LSC program is the means through which the government delivers certain services to the indigent. Because the relationship in both cases is created and funded by the government, Congress's power to define the services to be delivered is the same in both cases.[10]

The court of appeals recognized this equivalence elsewhere in its opinion. Thus, in rejecting a challenge to the 1996 Act based on the alleged First Amendment associational bonds between lawyers and clients, the panel (unanimously) held that:

> [T]he lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in

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[10] The dissenting member of the panel underscored that the focus is on the delivery of services by offering an example of a hypothetical government services program (to provide accounting services to a segment of the population and in which the accountants subsidized by the government to provide this service could not initiate litigation to change the tax laws) in which *Rust* would apply. App. at 39a.

> *Rust*. [T]he LSCA has always limited the range of legal services available through LSC grantees. . . The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200, 111 S. Ct. 1759. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection because (as in *Rust*) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.
>
> [J]ust as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSC [Act].

App. 14a-15a.

Given the parallel between the Title X and LSC programs, *Rust* controls the disposition of the suit-for-benefits issue, which, like the other limitations in the 1996 Act, is simply another example of Congress's lawful exercise of its power to "limit the menu" of services it will pay for.

*Second*, the court of appeals underestimated the value and weight to be accorded the speech in *Rust*. *Rust* dealt with a program in which the disfavored (and unfunded) speech involved an *independent* constitutional right—a woman's right to an abortion. The court pointed to no authority to support its conclusion that arguments in a courtroom in the course of a lawsuit designed to secure a statutorily created benefit for a particular individual rank higher in the pantheon of free speech values than speech related to a woman's right to exercise her constitutional right to an abortion. The LSC lawyer's speech is no more sacrosanct than that of the Title X doctor.[11] The two are governed by the same rule.

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[11] Under the panel's approach, more protection would be given to speech related to securing a statutory benefit than speech related to exe-

### 4. To The Extent That The Majority Relied On Rosenberger, Its Reliance Was Misplaced

Finally, as the dissenting member of the panel concluded, to the extent the court relied on *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) to strike down the suit-for-benefits limitation, its reliance was misplaced. In *Rosenberger*, this Court held that when the government spends money to create a public forum dedicated to promoting the free exchange of ideas—like a university newspaper—it may not selectively subsidize points of view. To state the holding is to illustrate why it has no relevance here. The LSC program is not a public forum, and it is not dedicated to the free exchange of ideas. It is a government program dedicated to providing a defined group of legal services to the indigent, in the same way the Title X program in *Rust* was designed to provide a defined group of family planning services to the indigent.

*Rosenberger's* irrelevance was recognized by Justice Byron White (part of the *Rust* majority), sitting by designation in *LASH III* :

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny. This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers," unlike the LSC program where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide profes-

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(*continued*)

cising an independent constitutional right. *Comp. Lavine v. Milne*, 424 U.S. 577, 584 n. 9 (1976) ("Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support") (citation omitted) with *Roe v. Wade*, 410 U.S. 113 (1973).

> sional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

*LASH III*, 145 F.3d at 1028 (citations omitted). This same conclusion was reached by the dissenting member of the panel in this case. App. 37a-38a.

In *Finley*, this Court reconfirmed that the distinguishing feature of *Rosenberger* is the use of government funds to create a limited public forum. *Finley*, 118 S. Ct. at 2178 ("We held [in *Rosenberger*] that . . . the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints."). *See also id.*, at 2184 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum . . ") (Scalia, J., concurring).

Because the LSC program is not a limited public forum for the free exchange of ideas, *Rosenberger* has no bearing on the analysis of the suit-for-benefits limitation. *Rust* controls. The limitation is constitutional.

### B. The Second Circuit's Decision Concerning The Suit-For-Benefits Limitation Conflicts With The Ninth Circuit's Decision in LASH III

The petition for certiorari should also be granted because the court of appeals' ruling that the suit-for-benefits limitation is unconstitutional conflicts with the decision of the Court of Appeals for the Ninth Circuit. In *LASH III*, that court rejected constitutional challenges to the limitation at issue, stating that "[t]he regulations promulgated by the LSC . . . are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *LASH III*, 145 F.3d at 1024. Justice White, writing for the Ninth Circuit, concluded that the fact that *Rust* involved health care and that this case involves legal services is irrelevant, and that what ultimately matters is that both cases involve the ability of the

government to define the contours of programs that it creates and that it subsidizes to deliver a defined set of services to the indigent. *Id.*, at 1028.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
October 5, 1999

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 2020—August Term, 1997

(Argued: March 20, 1998 Decided: January 7, 1999)

Docket No. 98-6006

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CARMEN VELAZQUEZ, et al,

*Plaintiffs-Appellants,*

—v.—

LEGAL SERVICES CORPORATION,

*Defendant-Appellee,*

UNITED STATES OF AMERICA,

*Intervenor-Appellee.*

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Before:

JACOBS, LEVAL, and GIBSON,*

*Circuit Judges.*

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* The Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeal from an order of the United States District Court for the Eastern District of New York (Frederic Block, District Judge), denying plaintiffs' motion for a preliminary injunction against enforcement of restrictions imposed by statute and regulation upon recipients of funding from the Legal Services Corporation.

Affirmed in part, reversed in part.

Judge Jacobs dissents in part in a separate opinion.

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BURT NEUBORNE, New York, N.Y. (Deborah Goldberg, E. Joshua Rosenkranz and David S. Udell, The Brennan Center for Justice, New York, N.Y.; Peter M. Fishbein and Alan Rothman, Kaye Scholer, Fierman, Hays & Handler, LLP, New York, N.Y., On the Brief), *for Plaintiffs-Appellants*.

ALAN LEVINE, Kronish, Lieb, Weiner & Hellman, LLP, New York, N.Y. (Stephen A. Wieder, Stephen L. Ascher, of counsel), *for Defendant-Appellee*.

STEPHEN W. PRESTON, Deputy Assistant Attorney General, Washington, D.C. (Frank W. Hunger, Assistant Attorney General, Washington, D.C., Zachary W. Carter, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., Barbara L. Herwig and Matthew M. Collette, Attorneys, Department of Justice, Washington, D.C., on the brief), *for Intervenor-Appellee*.

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LEVAL, *Circuit Judge*:

This appeal concerns the validity of restrictions imposed by Congress and the Legal Services Corporation ("LSC") on the professional activities of entities that receive funding from LSC ("LSC grantees"). Plaintiffs are lawyers employed by New York City LSC grantees, their indigent clients, private contributors to LSC grantees, and state and local public officials whose governments contribute to LSC grantees. Plaintiffs sought a preliminary injunction against the enforcement of the restrictions, contending they violate various provisions of the U.S. Constitution. The district court denied a preliminary injunction, finding that plaintiffs had failed to establish a probability of success on the merits. We affirm in part and reverse in part.

## I. *Background*

A. *The Legal Services Corporation and the Challenged Statute.* LSC is a non-profit government-funded corporation, created by the Legal Services Corporation Act of 1974 ("LSCA"), 42 U.S.C. § 2996 *et seq.*, "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC fulfills this mandate by making and administering grants to hundreds of local organizations that in turn provide free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually. *See Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 688 (D.C. Cir. 1991); S. Rep. 104-392 at 2-3 (1996). Many LSC grantees are funded by a combination of LSC funds and other public or private sources. S. Rep. 104-392 at 3; A. 225, A. 297. LSC grantees are governed by local Boards of Directors who set policies and priorities in response to local conditions and client needs. LSC is empowered to implement the LSCA through the traditional administrative rulemaking process. *Tex. Rural Legal Aid*, 940 F.2d at 692.

From the outset of the LSC program, LSC grantees have been restricted in the use of LSC funds. *See* 42 U.S.C. § 2996f(b)(1)-(10) (prohibiting use of LSC funds in, *inter alia*, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion). Recipient organizations are also barred from using most nonfederal funds for any activity proscribed by the LSCA. *See* 42 U.S.C. 2996(i)(c).

In 1996, Congress substantially expanded the restrictions on activities of LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("OCRAA," or "the 1996 Act"), reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. 104-208, § 502, 110 Stat. 3009 (1997). Section 504 of OCRAA, set forth below in pertinent part,[1] bars the use of LSC funds to

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[1] None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . .—

> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency (the "executive branch provision");
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect (the "agency adjudication provision");
>
> (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body ( the "legislation provision") (subsections (2), (3), and (4) are collectively the "lobbying provisions");
>
> (5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation (the "LSC oversight provision"); . . .

*(footnote continued)*

aid entities that perform various activities including lobbying, participation in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees under fee shifting laws, litigating on behalf of prisoners, and seeking to reform welfare.[2]

Congress left no question of its intention to restrict grantees' use of non-federal and federal funds alike. The Act provides that while program recipients may "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be

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> (7) that initiates or participates in a class action suit (the "class action provision"); . . .
>
> (11) that provides legal assistance for or on behalf of [certain] alien[s] (the "aliens provision");
>
> (12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . (the "training provision");
>
> (13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees (the "attorneys' fees provision"); . . .
>
> (15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison (the "incarcerated client provision");
>
> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation (the "welfare reform provision").

OCRAA, §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16).

[2] The 1996 legislation also restricted LSC grantees from litigation or activity involving political redistricting, § 504(a)(1) and from litigation "with respect to abortion," § 504(a)(14). Plaintiffs do not challenge these restrictions.

expended by recipients for any purpose prohibited by this Act." § 504(d)(2)(b). Moreover, § 504(d)(1) requires recipients to notify all non-federal donors that their contributions "may not be expended for any purpose prohibited by . . . this title."

In August 1996, LSC proposed regulations to implement the 1996 Revisions, which, *inter alia*, (1) prohibited a grantee from "us[ing] non-LSC funds for any purpose prohibited by the LSC Act," 61 Fed. Reg. 41960, 41962 (1996); (2) prohibited any organization controlled by a grantee from pursuing restricted activities (the "interrelated organizations prohibition"), *see id.*; 50 Fed. Reg. 49276, 49279 (1985) (defining "control" as "the ability to determine the direction of [or] influence the management or policies" of another organization); and (3) applied the OCRAA restrictions to any third party to whom a grantee transfers LSC funds, and to any private funds transferred from a grantee to a third party irrespective whether the funds were private or public (the "transfer of funds provision"). 61 Fed. Reg. 63749, 63752 (1996). The combined effect of the regulations was to prohibit LSC grantees from engaging in any restricted activity, even through a legally distinct affiliate organization. These regulations were promulgated in December 1996. *See* 45 C.F.R. §§ 1610.3, 1610.8 (1996).

B. *The Challenges to the Statute and Implementing Regulations.* Plaintiffs filed this lawsuit in January 1997, alleging that the restrictions on the use of non-federal monies violate their rights under First, Fifth, and Tenth Amendments to the United States Constitution. They also claimed that the restrictions on the use of federal funds violate the First Amendment, the doctrine of Separation of Powers, and the Tenth Amendment. Plaintiffs sought a preliminary injunction only to enjoin restrictions on the use of non-federal funds.

Soon after this suit was filed, and before the hearing on plaintiffs' application for a preliminary injunction, a federal district court in Hawaii issued an order partially granting a motion by a different set of plaintiffs to preliminarily enjoin

enforcement of the OCRAA restrictions. *See Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) ("*LASH I*"). *LASH I* concluded that under *Rust v. Sullivan*, 500 U.S. 173 (1991) and other Supreme Court decisions, congressional restrictions on the activities of federally-funded entities were permissible only so long as they "left open adequate channels for [protected] speech."[3] 961 F. Supp. at 1414. Applying this standard, the court found that the LSC regulations unduly burdened grantees' protected First Amendment rights to lobby, to associate, and to have meaningful access to courts. Central to the court's analysis was its finding that the interrelated organizations prohibition barred LSC

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[3] Because there is considerable overlap between the issues contested in *Rust* and those presented by this appeal, we briefly review that opinion.

The *Rust* plaintiffs brought a facial challenge to conditions attached by the Department of Health and Human Services to family planning services provided under Title X of the Public Health Service Act. *See* 500 U.S. at 178-79. The Act provided that no Title X funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178 (quoting statute). The challenged regulations endeavored "to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 179 (internal quotation marks omitted).

The regulations attached three principal conditions on the grant of federal funds for Title X projects. First, Title X projects were precluded from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." *Id.* Second, Title X projects could "not encourage, promote, or advocate abortion as a method of family planning." *Id.* at 180. Third, the regulations provided that the Title X project must be "physically and financially separate from prohibited abortion activities." *Id.* The regulations set forth a nonexclusive list of factors to determine whether the separateness requirement had been met. *Id.* at 180-81.

The Supreme Court rejected plaintiffs' viewpoint discrimination and unconstitutional conditions arguments. The Court concluded that the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." *Id.* at 193. The Court rejected the unconstitutional conditions claim with the observation that Congress has "not denied the right to engage in abortion related activities [but] merely refused to fund such activities out of the public fisc." *Id.* at 198.

grantees from creating affiliate organizations that could engage in restricted activity. *See LASH I*, 961 F. Supp. at 1415-16. The court held that as implemented, the 1996 restrictions denied to grantees not only the ability to undertake restricted activity directly, but also all alternative channels for exercise of these constitutionally protected activities. The court therefore determined that plaintiffs' constitutional challenge was likely to prevail on the merits and enjoined enforcement of portions of the OCRAA restrictions. *See id.* at 1421-22.

In order to cure these constitutional infirmities, LSC issued "interim regulations" in March 1997 modelled after the restrictions upheld by the Supreme Court in *Rust*. *See* 62 Fed. Reg. 12101, 12101-04 (1997) (interim regulations "are intended to address constitutional challenges raised by the previous rule"); *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F.Supp. 1288, 1290 (D. Haw. 1997) ("*LASH II*"); *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323, 332-333 (E.D.N.Y. 1997). The interim regulations modified the earlier rules in two important respects. LSC revised the transfer of funds rules so that, in most cases, non-federal funds transferred by a grantee to a controlled affiliate would cease to be subject to the restrictions. *Compare* 62 Fed. Reg. 12101, 12103, § 1610.7 (1997) *with* 45 C.F.R. § 1610.7 (1996) (61 Fed. Reg. 63749, 63752). Equally important, a new section entitled "Program Integrity of Recipient," 62 Fed. Reg. 12101 at 12103-04, § 1610.8, provided that grantees could maintain a relationship with "affiliate" organizations, which could in turn engage in restricted activities so long as the association between the organizations met standards of "program integrity." The nonexclusive list of factors relevant to the determination of program integrity were (1) the existence of separate personnel; (2) the existence of separate accounting and timekeeping records; (3) the existence of separate facilities; and (4) the extent to which signage and identification distinguishes recipient from affiliate. *Id.* at 12104.

Ten days after the interim rules were promulgated, the court below held a hearing on the plaintiffs' motion for a preliminary injunction. *See* 985 F. Supp at 332. The district court found that "although based on the *Rust* program integrity requirements," the interim regulations differed from those approved in *Rust* in three ways. *Id.* at 333. First, the LSC regulations, unlike *Rust*, included provisions that organizations under the "control" of a grantee would be subject to the statutory restrictions, unless the program integrity requirements were met. *See id.* Second, while the *Rust* regulations provided that "the 'degree of separation' of facilities would be considered," the interim regulations required the "existence" of separate facilities. *Id.* Third, the *Rust* regulations provided that the determination "whether a recipient and affiliate were sufficiently separate would be based on all 'facts and circumstances' whereas the interim regulations made no such statement, which arguably implied that [to satisfy the separation rules] a recipient would have to satisfy each and every program integrity factor." *Id.* at 333-34.

The district court expressed some doubt as to the constitutionality of the interim regulations but nevertheless delayed decision. Observing that "these are interim regulations," the district court determined that it might "be provident to withhold judgment until the final regulations were promulgated." *Id.* at 334. The court speculated that "maybe after we have this argument today, there will be more regulations," and therefore undertook to "allow[ ] some period of time to let the dust settle until we get final regulations." *Id.*

On May 21, 1997, LSC replaced the interim regulations with a "Final Rule" (the "final regulations"). *See id.* As the district court noted, "[t]he revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements." *Id.* at 335. The three differences between the LSC regulations and the Title X regulations approved in *Rust* noted by the court at the March hearing were eliminated. *See id.* Concluding that the final regulations

represented a permissible construction of the 1996 Act, *see id.* at 338-39, and were consistent with the First Amendment, the district court determined that the statute and regulations were not likely to be invalidated and therefore denied the motion for a preliminary injunction. *See id.* at 326-27.[4] This appeal followed.

## II. *Discussion*

On appeal, plaintiffs object that the final regulations represent an unreasonable interpretation of the 1996 Act, and therefore fail under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Plaintiffs also challenge the constitutionality of the 1996 Act and the final regulations, arguing that they impermissibly burden grantees' exercise of First Amendment activities, contrary to the command of *Rust v. Sullivan*, and that they constitute a viewpoint-based restriction on expression.

The posture of this appeal imposes upon plaintiffs a heavy burden. Because this is a facial challenge to legislative action, we need only determine whether there are "any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act." *Able v. United States*, 88 F.3d 1280, 1290 (2d Cir. 1996); *see also Rust*, 500 U.S. at 183 (plaintiffs "must establish that no set of circumstances exist under which the Act would be valid. The fact that the regulations might

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[4] The district court also rejected plaintiffs' due process and equal protection challenges. *See id.* at 344. These claims have been abandoned on appeal.

The *LASH* court reached a result similar to the decision of the district court in this case, dismissing the unconstitutional conditions challenge with the observation that the "reasoning [of *Rust*] controls the result here." *LASH II*, 981 F.Supp. at 1299, *aff'd in relevant part, Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998) (*LASH III*). Among the issues before us, *LASH III* only addressed the unconstitutional conditions challenge. The Ninth Circuit did not address the claims based on abridgment of the lawyer-client relationship or viewpoint discrimination.

operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.") (citation omitted).

Plaintiffs' burden is also increased because the preliminary injunction they seek is against the government. Grant of a preliminary injunction normally requires a showing by the moving party of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balancing of the hardships tipping decidedly in favor of the moving party. *See Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997). But where a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the "fair ground for litigation standard" but must show "likelihood of success." *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

### A. *Statutory Claim*

We consider first plaintiffs' contention that the final regulations constitute an unreasonable interpretation of the 1996 Act. Plaintiffs claim that LSC's original rules, which precluded grantees from establishing or funding affiliates with the purpose of undertaking restricted activity, fairly reflected the statutory text. They maintain that the more lenient final rules, crafted after *LASH I* held the original rules unconstitutional, conflict with congressional command. Plaintiffs ask us to find that the final rules are unauthorized by the statute, and that the statute, without the flexibility provided by the final rules, is unconstitutional. *See* Appellants' Br. at 40.

LSC enjoys "the full measure of interpretive authority under the [LSCA]" and its interpretations of the Act are entitled to deference under *Chevron*. *See Texas Rural Legal Aid*, 940 F.2d at 690. Under this standard, LSC's regulations must be upheld unless "Congress has directly spoken to the precise question at issue" and LSC has resolved it contrary to statute, or unless the regulation cannot be termed a "permissible con-

struction" of the statute or is arbitrary or capricious. *See id.*; *Chevron*, 467 U.S. at 842-44.

Plaintiffs argue that Congress plainly intended to bar LSC grantees from undertaking restricted activities through affiliate organizations. This argument relies principally on § 504(d)(2)(B) of the Act, which provides that LSC grantees may "use[ ] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act." According to plaintiffs, this language plainly articulates Congress's desire to prohibit grantees from engaging in restricted activity through an affiliate, even with non-federal funds. By permitting grantees to fund affiliates who engage in restricted activity, argue plaintiffs, the final rules impermissibly allow non-LSC funds to be "expended by recipients" for prohibited purposes. Plaintiffs claim to find support in the legislative history, which explains that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392 at 13 (1996). Plaintiffs contend that the final rules—which authorize grantees to create affiliates and fund them with nonfederal moneys allowing them to conduct activity proscribed under the Act—facilitate a purpose expressly precluded by Congress, and thus fail under the first step of *Chevron*.

We are not persuaded. Nowhere in the statute does Congress speak directly to the question whether grantees may create and support affiliate organizations. The Act does not indicate whether a transfer of non-federal funds by a grantee to an affiliate, or the affiliate's subsequent use of such transferred non-federal funds for a prohibited purpose, constitutes an "expend[iture] by [a] recipient[ ]" under the Act. We conclude that Congress has not spoken clearly regarding grantees' authority to design and fund affiliate organizations, so that the first prong of *Chevron* is inapplicable.

We are also reluctant to accept plaintiffs' invitation to find that the final regulations are unauthorized, and that the statute without those regulations is unconstitutional, because of the rule favoring an interpretation of a statute that preserves its constitutionality. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895).

We find, moreover, that the final rules represent a "permissible construction" of the Act and therefore survive the second *Chevron* inquiry. While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act.

B. *Constitutional Claims*

1. *Lawyer-Client Relationship.* Plaintiffs contend that the First Amendment forbids Congress from interfering with the "intense associational bond" between lawyer and client, even when Congress funds the relationship. Appellants' Br. at 30. Plaintiffs allege that the welfare reform provision, the attorneys' fees provision, and the lobbying provisions encroach upon "the autonomy and professional judgments" of LSC lawyers, in violation of their First Amendment rights.

Plaintiffs rely heavily on dictum drawn from *Rust v. Sullivan*. There, the Supreme Court remarked, "It could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. Rather than address the argument, however, the *Rust* court found that "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* Because Title X patients should be on notice that the scope of care received was subject to Congressional

limitation, a "traditional" or "all-encompassing" doctor-patient relationship could not be said to exist. *Id.* Plaintiffs interpret this passage to extend constitutional protection to the doctor-patient relationship, and, by analogy, to the lawyer-client relationship.

We find the argument unconvincing. As a preliminary matter, *Rust* did not confer constitutional protection on the doctor-patient relationship. The opinion only speculated that the relationship may be protected from government regulation and expressly declined to resolve the question. *Id.* The question was left open in *Rust* and remains open today.

Nor need we resolve it here. Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. *See* 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." *See Overview of LSC* at 4 (1996) (http://ltsi.ncs/lsc/about.html). Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection, because (as in *Rust*) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.

Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

2. *Unconstitutional Conditions.* Plaintiffs' second constitutional contention is that the program integrity rules contained in the final regulations unreasonably burden a grantee's ability to use nonfederal funds to engage in restricted activity. Because each of the provisions of the 1996 Act burdens protected rights of association and speech, say plaintiffs, the undue burden of the final rules amounts to an unconstitutional condition on the receipt of LSC subsidies.

Three Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim. In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), Taxation With Representation (TWR), a non-profit organization devoted to studying tax issues and lobbying for tax reform, challenged Section 501(c)(3) of the Internal Revenue Code, which provided that organizations engaged in lobbying could not receive tax-deductible contributions. *See* I.R.C. § 501(c)(3). TWR argued that § 501(c)(3) impermissibly conditioned the benefit of contribution deductibility on the relinquishment of the First Amendment right to lobby. *See Taxation With Representation*, 461 U.S. at 545. Because this was not an instance where "Congress [had] discriminate[d] invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the Court applied minimal scrutiny and upheld the law. *Id.* at 548 (alteration and internal quotation marks omitted). Nevertheless, Justice Rehnquist's majority opinion

noted, and a concurring opinion relied upon, the fact that the I.R.C. allowed § 501(c)(3) organizations to establish financially independent but wholly-controlled lobbying affiliates under I.R.C. § 501(c)(4) without compromising their eligibility for deductible contributions. *See id.* at 544 (majority opinion); *id.* at 552-53 (Blackmun, J., concurring) (concluding that § 501(c)(3) alone would be "constitutionally defect[ive]").

The next Term, the Court invalidated a condition denying federal public broadcasting funds to public stations that engage in editorializing. *See F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). The Court found that because a "noncommercial educational station that receives only 1% of its overall income" from the Corporation for Public Broadcasting (CPB) would be barred from editorializing, stations "ha[ve] no way of limiting the use of [their] federal funds to all noneditorializing activities, and, more importantly, [they are] barred from using even wholly private funds to finance editorial activity." *Id.* at 400. The Court emphasized that Congress could cure the statute by amending it to allow stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." *Id.*

Finally, in *Rust*, 500 U.S. 173 (1991), recipients of family planning funds under Title X of the Public Health Services Act challenged regulations prohibiting Title X recipients from engaging in abortion counseling, referral, and any other activities advocating abortion as a means of family planning. In *Rust*, as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. *See id.* at 180-81. The Court observed that "[t]he Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Id.* at 196 (emphasis omitted). For their part, Title X "employees remain

free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Id.* at 198. Because grantees were not "effectively prohibit[ed] . . . from engaging in the protected conduct outside the scope of the federally funded program," this circumstance was different from that considered in *League of Women Voters*, and there was no unconstitutional conditions violation. *Id.* at 197.

Taking these cases together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression. Section 501(c)(3)'s prohibition on lobbying in *Taxation With Representation* was permissible because the organizations receiving the benefit of deductibility could undertake lobbying activities through a § 501(c)(4) affiliate. In *League of Women Voters*, on the other hand, the prohibition on editorializing by CPB grantees was invalidated because the law left no adequate alternative avenue for the protected expression.

Notwithstanding *Rust*'s considerable superficial similarity to this case, we think it is the least pertinent of these precedents. Without diminishing its potential importance to some grantees, the speech restriction in *Rust* was nonetheless very narrow; it was limited to speech at odds with the values Congress was seeking to advance through its grant program. As the Supreme Court noted in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), discussing *Rust*, "When the government disburses public funds to private entities to convey a governmental message, it may . . . ensure that its message is neither garbled nor distorted by the grantee."

In these respects, *Rust* is unlike the present case. The restrictions here placed on grantees are not narrow; they are extremely broad. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws. Nor does the justification that prevailed in *Rust*—avoiding the distortion or dilution of the very government message

advanced by the program—have any bearing here. For this program, unlike Title X in *Rust*, is not advancing any particular set of values that might be diluted or distorted if the forbidden speech were permitted. Here Congress has simply chosen to rule that organizations which accept LSC funds to finance their activities shall not engage in other types of activities. We do not think *Rust* compels the conclusion that program integrity rules modelled on those governing Title X necessarily allow adequate avenues for protected expression in statutory or factual contexts where the burden on speech may be more significant or where the relationship between the burden and the government benefit may be more attenuated.

Our conclusion that the First Amendment tolerates this restriction on speech is influenced more by *Taxation Without Representation*'s approval of the restriction in lobbying by § 501(c)(3) organizations and by the suggestion in *League of Women Voters* that the prohibition in editorializing by CPB grantees would have been acceptable if the law allowed them adequate alternative avenues for expression through affiliates than by the holding of *Rust*. Nonetheless, *Rust* is consistent with these cases, and tends to support their suggestion that the program we consider here can withstand at least a facial challenge despite its broad restrictions on the speech of LSC grantees.

Plaintiffs contend that, notwithstanding the authority of these cases, the 1996 Act is unlawful. They point to the "immensely wasteful" program integrity requirements of separate offices, equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates. Appellants' Br. at 37. Plaintiffs allege that the revised program integrity rules—although virtually identical to those approved in *Rust*[5]—impose "extraordinary" burdens that

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[5] Under both Title X and the 1996 Act regulatory schemes, a grantee may provide restricted activities only if the restricted service provider is distinguished by (1) separate personnel; (2) separate accounting records; (3) physical separation; and (4) signs or other outward markers of separation. *Compare* 45 C.F.R. § 1610.8 *with* 42 C.F.R.

impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate. *Id.* The costs of compliance, they argue, are "so substantial" as to be prohibitive. Appellants' Reply Br. at 18. They argue further that the justification in *Rust* for requiring substantial separation between the program recipient and the affiliate—to avoid the risk of weakening or garbling the government's message—is not present here, as the government is not using its grantees to advocate a message. Thus, plaintiffs argue, there is no justification for requiring the degree of separation of affiliates that was upheld in *Rust*.

We find that plaintiffs' allegations are insufficient to sustain a *facial* challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. And it may be, as plaintiffs contend, that the program integrity requirements may prove especially burdensome in the context of legal services. We are unable to assess these contentions on the sparse record before us, and we need not assess them to decide this appeal. Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with

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§ 59.9 (suspended 1993). Under both schemes, whether the funded and restricted programs are sufficiently separate is determined on a case-by-case basis. *See* 45 C.F.R. § 1610.8(3); *Rust*, 500 U.S. at 180-81. In almost every respect, the burden of separation is identical under the two schemes. *See LASH III*, 145 F.3d at 1024 (noting that "[t]he regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust*").

grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to "establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected. *Rust*, 500 U.S. at 183 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

3. *Viewpoint Discrimination.* We turn finally to plaintiffs' claim that the 1996 Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies. It appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provision of the Act.[6]

With respect to the lobbying provisions, the claim is misplaced. The classification established by these provisions is based on subject matter, not viewpoint. We think it clear that Congress may discriminate on the basis of the subject matter of grantees' expression, because such discrimination properly "confine[s the LSC program] to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. We thus find that the lobbying restrictions constitute valid limitations on the scope of the LSC program.

The legislation provision, for example, restricts LSC grantees from "attempt[ing] to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body." OCRAA, § 504(a)(4). While this language imposes a sweeping restriction on grantee activity, it burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed. Because it prohibits the grantee from "attempt[ing] to influence *the pas-*

[6] The plaintiffs' brief also suggests that the redistricting provision and abortion provision impermissibly discriminate on the basis of viewpoint. Brief for Appellants at 27. As noted above, however, plaintiffs did not challenge these provisions in the court below, and so arguments challenging their validity are not properly before us.

*sage or defeat*" of a legislative or constitutional initiative, the prohibition applies regardless whether the prohibited activity would have sought change or opposed change. The provision operates only to restrict LSC-funded entities from lobbying with respect to legislative decisions, regardless of viewpoint.

The agency adjudication provision similarly restricts grantees from "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect." *Id.* at § 504(a)(3). We perceive nothing in this language that burdens one viewpoint more than another; the restriction permits grantees to participate on neither side of a rule-creating adjudicatory proceeding. Rather, the provision permissibly channels grantee program activity away from adjudicatory policymaking in a viewpoint-neutral manner.

The executive branch provision similarly forbids grantees from "attempt[ing] to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency." *Id.* at § 504(a)(2). We interpret this provision to define a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint. In the language of *Rust*, the provision does not suppress ideas but merely prohibits "a project grantee . . . from engaging in activities outside the project's scope." 500 U.S. at 194.

The welfare reform provision of § 504(a)(16) is more obscure. It includes four categories of prohibited activities "involving an effort to reform a Federal or State welfare system"—initiating legal representation, and participating in litigation, lobbying, or rulemaking—with an exception relating to the legal representation or litigation prohibitions. Under the most natural reading of each of these provisions, three appear to prohibit the type of activity named regardless of viewpoint, while one might be read to prohibit the activity only when it seeks reform.

The litigation prohibition is clearly viewpoint neutral. It denies grant funds to an entity that "participates in any . . . way, in litigation . . . involving an effort to reform a . . . welfare system." § 504(a)(16). Litigation by definition has at least two sides, and one "participates" in the litigation regardless of which side one is on. If litigation occurs "involving an effort to reform a . . . welfare system," one "participates" in it whether one is on the side seeking reform or the side opposing it. Grantees are therefore prohibited not only from litigating in an effort to reform a welfare system, but also from intervening or filing amicus briefs in such litigation in opposition to proposed reforms. We therefore conclude that the basic prohibition on participating in litigation involving an effort to reform a welfare system is viewpoint neutral.

The same considerations apply to the prohibition on "lobbying" and "rulemaking" "involving an effort to reform a . . . welfare system." One "participates" in lobbying and rulemaking "involving an effort to reform" whether one's participation supports or opposes the reforms under consideration.

The disqualification of an entity that "initiates legal representation . . . involving an effort to reform a . . . welfare system" is perhaps less clear. One reading of this clause seems to prohibit only efforts aimed at reform. A person who intended to oppose reform might not see himself as covered by a prohibition on activity "involving an effort to reform." On another interpretation, the statute could be read to cover both support and opposition to reform. Under this interpretation, if some other person is making an effort to reform the welfare system, one who initiates a legal representation intended to oppose that effort is engaging in activity that involves (*i.e.*, concerns) an effort to reform the system.

Even if it involves some linguistic strain to read the provision this way, two factors persuade us to do so. First, subsection (a)(16) on welfare reform is one of a long string of prohibitions on activity related to reform efforts. All the others are clearly expressed in a manner that bars activity on

either side of the issue. It is unlikely that, with respect to welfare and welfare alone, Congress intended to bar only pro-reform activity and not opposition to reform.[7] If the welfare provision were read to prohibit only activity that sought reform and not activity that opposed it, this would mean that Congress had acted with respect to welfare in a manner inexplicably at variance with the law's numerous parallel provisions. It makes far better sense, if the words of the statute permit, to interpret the welfare provision as consistent with those provisions.

Second, to read the welfare provision as viewpoint biased would render it unconstitutional. As we noted above, *see supra* at 14, courts should be reluctant to read statutes in a manner that renders them unconstitutional. If two readings are possible, the one that would preserve the statute is generally preferable. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895).

We are therefore constrained to read the basic limitations of the welfare provision of § 504(a)(16) as viewpoint neutral prohibitions on the specified activities, regardless whether the activities are undertaken to promote reform or to defeat it.

There is, however, another specification in the welfare provision that is inescapably viewpoint-biased. Subsection (a)(16) expressly provides that its prohibitions do not prevent a grantee from representing "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation" (the "suit-for-benefits exception"). According to this exception, representation of a client seeking a welfare bene-

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[7] This possibility is rendered all the more unlikely by the fact that the legislative history shows a particular congressional concern to block LSC grantees from *opposing* welfare reform. *See* 142 Cong. Rec. H8179 (daily ed. July 23, 1996) (statement of Rep. Burton) ("The LSC is fighting the welfare reform plan in Wisconsin . . . . Why are taxpayers' dollars being used to fight the very things we think are important?").

fit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

It seems clear to us that this limitation on the suit-for-benefits exception is not viewpoint neutral. It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint, and requires us to decide whether this discrimination is permissible in the context of the LSCA.

The government's "[d]iscrimination against speech because of its message" is suspect under the First Amendment. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) (noting that such discrimination is "presumed to be unconstitutional"). Whether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three relevant recent Supreme Court holdings.

In *Rust v. Sullivan*, 500 U.S. 173 (1990), the Court upheld regulations forbidding recipients of government funds for family planning from counselling or advocacy related to abortion. *See id.* at 203.

In *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), the Court last term upheld a requirement that the NEA, in making grants for the arts based on excellence, also "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American people." *Finley*, 118 S. Ct. at 2171.

In *Rosenberger*, the Court struck down a provision in a program of governmental grants to support student publications

that excluded from eligibility publications expressing a viewpoint on religion. See *Rosenberger*, 515 U.S. at 837.

We assess the relevance of these precedents differently from our dissenting colleague. Judge Jacobs argues that *Rust* and *Finley* together establish the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants. Viewpoint discrimination, he argues, is suspect only where, as in *Rosenberger*, the government seeks to promote a diversity of private speech. Judge Jacobs relies heavily on explanatory language in the *Rust* opinion, which was quoted by the Supreme Court in *Finley*:

> The Government can, without violating the Constitution, selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Rust*, 500 U.S. at 193; *see also Finley*, 118 S. Ct. at 2168.

Under Judge Jacobs's analysis, just as Congress may lawfully fund family planning services conditioned on the grantee's not counseling on the availability of abortion, so Congress also may fund the legal representation of a welfare applicant conditioned on the grantee's not raising arguments that question the validity of any statute, regulation or governmental procedure pertaining to welfare.

We acknowledge that the words from *Rust* that Judge Jacobs cites seem on their face to support his view. But we doubt that these words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what a court has done, rather than at what the court has said in explanation. Explanations that seem sound enough in the context of the facts for which they are devised often carry implications the court would never subscribe to if applied to other facts not in con-

templation. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.' "); *cf. CBS, Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 934-35 (2d Cir. 1980) (Newman, J.) ("[T]he safer course is to read judicial opinions as deciding only what they purport to decide.").

The quotation from *Rust*, for example, seems on its face to imply that Congress could lawfully fund institutions to study the nation's foreign or domestic policies, conditioned on the grantee's not criticizing, or advocating change in, the policies of the government. That would fall within the parameters of choosing "to fund one activity to the exclusion of [an]other." Congress would be "selectively fund[ing] a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." Nonetheless, we think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy.[8]

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[8] Concurring in the judgment in *Finley*, Justice Scalia did argue that the government can allocate subsidies "*ad libitum*, insofar as the First Amendment is concerned." *Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring in judgment). This position was joined by only one other Justice, however. The majority left no doubt that the First Amendment "has application in the subsidy context," *id.* at 2179, and that a subsidy "aim[ed] at the suppression of dangerous ideas" would violate the First Amendment, *id.* at 2178 (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983)).

We think the resolution lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' " *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy. "[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people. For those reasons we think it clear that, notwithstanding *Rust*'s semantic endorsement of Congress's right to fund one activity to the exclusion of another, the Supreme Court would not approve a grant to study governmental policy, conditioned on the grantee's not criticizing the policy.

In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art. The fact that Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests that Congress may also make grants to fund the legal representation of welfare applicants under terms that bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success. Among the only directly effective ways to oppose a statute, regulation or policy adopted by government is to argue to a court having jurisdiction of the matter that the rule is either unconstitutional or unauthorized by law. The limitation on the suit-for-benefits exception prohibits a legal services organization that has received LSC grant funds from making such an argument on

behalf of a client, even though that argument may be necessary to establish the client's rights in precisely the representation for which the funding was granted.[9] Such a restriction is a close kin to those "calculated to drive 'certain ideas or viewpoints from the marketplace.' " *Finley*, 118 S. Ct. at 2179 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). To forbid a lawyer from articulating that idea in the court proceeding effectively drives the idea from the marketplace where it can most effectively be offered.

The Supreme Court's discussion in *Finley* underscores the suspect nature of the limitation on the suits-for-benefits exception for a further reason. In *Finley*, considerations of "decency and respect" were merely to be taken "into consideration." The Supreme Court stressed that the questioned provision offered "vague exhortation[s]" and "impose[d] no categorical requirement." *Id.* at 2176, 2177. The NEA might still make grants notwithstanding indecency. The Court, in fact, seemed to imply that an absolute prohibition, of the sort "calculated to drive 'certain ideas or viewpoints from the marketplace,' " would have required a different result. *Id.* at 2176, 2179 (internal citation omitted). The limitation on the suit-for-benefits exception is just such an absolute prohibition: It muzzles grant recipients from expressing any and all forbidden arguments.

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[9] We do not agree with Judge Jacobs' view that the statute merely prohibits lawyers from taking on certain representations. As a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses. We think furthermore that Judge Jacobs overstates the ease with which a lawyer can withdraw from litigation that is in progress and underestimates the prejudice to the client that may result from such a withdrawal.

For these reasons, we believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can survive such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception. The four most likely candidates for invalidation are (1) the entire Act; (2) the entire subsection (a)(16) relating to welfare reform; (3) the entire suit-for-benefits exception; and (4) the proviso to the effect that an attorney suing for a client's benefits may not challenge existing law.

We quickly conclude that the first and second possibilities go too far. "A court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines v. Brock*, 480 U.S. 678, 683 (1987) (internal quotation marks omitted). In our view, without this restriction, the 1996 Act will still "function in a manner consistent with the intent of Congress," *id.* at 685 (emphasis omitted). Our finding of unconstitutionality affects only one tiny restriction in the statute, which can otherwise continue to function as intended. Subsection (a)(16) can also continue to bar activities "involving an effort to reform a . . . welfare system," as Congress intended, without the unconstitutional provision.

The more troublesome question is whether the invalid viewpoint-based restriction should result in the invalidity of the entire suit-for-benefits exception, or only of the proviso that bars a grantee in the course of a legal representation of an eligible individual from arguing to amend or challenge any existing law. We recognize a reasonable argument that the overall intent of the Act is so opposed to challenges to law that the intent of Congress would be better served by striking down the entire suit-for-benefits exception than by allowing

a grantee lawyer representing a client to argue the invalidity of any existing rule of law.

On the other hand, because complex legislation represents an amalgam of different viewpoints and compromises, one might see the suit-for-benefits exception as an intentionally more measured provision, one recognizing that a lawyer engaged in the representation of a client must make the arguments necessary to secure the relief their client seeks. The proviso as drafted does not forbid grantee lawyers from challenging all laws—only those that were in existence at the time of the initiation of the representation. Thus, notwithstanding its hostility to litigation seeking legal reform, Congress intentionally permitted challenges to law in the context of individual representation so long as the challenge addressed a law passed after the initiation of the representation.

Because it is unclear which alternative better carries out the intent of Congress, we think it best to invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part. This conclusion follows the Supreme Court's guidance that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (citation and internal quotation marks omitted); *see also Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("[T]he presumption is in favor of severability."). We thus conclude that the viewpoint-based proviso barring grantee lawyers representing individuals from contesting the legality of an existing rule is severable from the overall suit-for-benefits exception. The exception permitting a grantee to "represent[ ] an individual eligible client [w]ho is seeking specific relief from a welfare agency" will survive our holding that the viewpoint-based proviso to the suit-for-benefits exception is unconstitutional.

We therefore direct the district court to enter a preliminary injunction barring enforcement of that part of the suit-for-

benefits exception of § 504(a)(16) that would make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." In all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status) from engaging in any of the activities prohibited by § 504. They will be prohibited under § 504(a)(16) from initiating legal representation, or participating in any other way in litigation, lobbying, or rulemaking concerning "effort[s] [by anyone] to reform a Federal or State welfare system." On the other hand, grantees will be permitted to represent "an individual eligible client who is seeking specific relief from a welfare agency," regardless whether such representation includes arguments that seek "to amend or otherwise challenge existing law." § 504(a)(16).

*Conclusion*

The district court's denial of a preliminary injunction is reversed solely with respect to the limitation on the suit-for-benefits exception of § 504(a)(16). In all other respects, the district court's order denying a preliminary injunction is affirmed.

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JACOBS, *Circuit Judge*, concurring in part, dissenting in part:

I agree with the conclusions of the majority opinion except insofar as it holds unconstitutional a critical proviso in a subsection of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996). That subsection

(i) denies Legal Services Corporation ("LSC") funding to any entity "that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system,"

(ii) creates an *exception* for the representation of "an individual eligible client who is seeking specific relief from a welfare agency,"

(iii) subject however to the *proviso* that bars LSC grantees from taking cases that "involve an effort to amend or otherwise challenge existing law."

The majority throws the section out of kilter by preserving the exception but striking the proviso, on the ground that under *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), the proviso amounts to viewpoint discrimination.

I respectfully dissent because:

(A) The proviso, which helps specify the type of representation that a grant recipient may undertake, is part of Congress's entirely appropriate—and necessary—specification of the services available in a program it created.

(B) The majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a "viewpoint" at all, it is one that advocates the delivery of welfare benefits to claimants.

*A. Program Definition*

In creating a government program, Congress can of course specify the goods and services that will be provided and the goods and services that will be excluded. In so doing, Congress is permitted to fund the exercise of some constitutionally protected rights, but not others. *See Rust v. Sullivan*,

500 U.S. 173, 194-95, 111 S. Ct. 1759, 1773 (1991). Although *Rosenberger* curbs the government's power to fund some *viewpoints* to the exclusion of others, that limitation operates only when the government creates a limited public forum for the expression of diverse viewpoints. A grantee of the Legal Services Corporation is not a public forum or the participant in a public forum in which it is invited to contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes.

*1. Statutory Authority*

From its inception, the purpose of the LSC has been to fund individual client services for indigent persons with legal problems. *See* 42 U.S.C. § 2996 (1994). Over the years, Congress has shaped and clarified the kind of legal services that LSC and, in some cases, its grant recipients may fund:

- No "fee-generating" cases. *See* 42 U.S.C. § 2996f(b)(1) (1994).
- No felony cases. *See* 42 U.S.C. § 2996f(b)(2) (1994).
- No civil actions challenging a criminal conviction. *See* 42 U.S.C. § 2996f(b)(3) (1994).
- No cases seeking "to procure a nontherapeutic abortion." *See* 42 U.S.C. § 2996f(b)(8) (1994).
- No school desegregation cases. *See* 42 U.S.C. § 2996f(b)(9) (1994).
- No cases involving the Military Selective Service Act, 50 App. U.S.C. § 451 *et seq.* *See* 42 U.S.C. § 2996f(b)(10) (1994).
- No cases involving assisted suicide. *See* 42 U.S.C.A. § 2996f(b)(11) (West Supp. 1998).

- No litigation (or other activity) regarding "the timing or manner of the taking of a census." *See* OCRAA § 504(a)(1), 110 Stat. at 1321-53.
- No class action litigation. *See id.* § 504(a)(7), 110 Stat. at 1321-53.
- No legal assistance to certain classes of aliens. *See id.* § 504(a)(11), 110 Stat. at 1321-54 to 1321-55.
- No litigation on behalf of someone incarcerated. *See id.* § 504(a)(15), 110 Stat. at 1321-55.
- No litigation on behalf of persons being evicted from public housing for selling drugs. *See id.* § 504(a)(17), 110 Stat. at 1321-56.

The majority opinion correctly rejects the constitutional challenges that the plaintiffs make to several of these program-shaping provisions. *See* Majority at pages 15-17 (rejecting challenge to prohibition on fee-generating cases); *id.* at pages 17-24 (rejecting unconstitutional condition challenge to all the § 504 restrictions).

The restriction that § 504(a)(16) imposes—on the use of LSC money to fund political agitation concerning welfare policy—is another effort by Congress to define the types of services that LSC grantees may provide and to channel all the government's funds (without substitution or displacement) to those services and no others. The exception for advocacy in suits to collect welfare benefits, as limited by the proviso barring expenditures to challenge existing law, serves the same purpose and operates in the same way.

The proviso on welfare litigation is not (as the majority appears to believe) an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first

place. There is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise). For example, a public interest lawyer cannot file a claim for job discrimination against a charitable agency she organized or has represented; and a public interest lawyer representing a plaintiff who is pressing for school vouchers cannot be expected to take on a representation that entails the argument that school vouchers are illegal or unconstitutional. The LSC's authorizing legislation as well as rules of legal ethics prohibit a lawyer from undertaking a representation in which that lawyer would be barred from pursuing a potentially fruitful avenue of argument.[1] A grantee (or a lawyer employed by a grantee) is ethically obliged to decline such a case, and may refer the client to a lawyer who can handle it, *see Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 343 (E.D.N.Y. 1997), and in some instances, the client will be referred to an affiliated entity, *see* Majority at pages 8-10.

The majority argues that as a "practical matter" an attorney will "often" not know what arguments may be needed in a given representation. *See* Majority at page 35 n.9. Since this is a *facial* challenge, however, this Court may not base its invalidation of this statute on a hypothetical set of circum-

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[1] *See* 42 U.S.C. § 2996e(b)(3) (1994) (requiring the LSC to "ensure" that the activities it finances are carried out in accordance with attorneys' ethical obligations); 42 U.S.C. § 2296f(a)(1) (1994) (requiring the Corporation to "insure the maintenance of the highest quality of service and professional standards"); *Model Rules of Professional Conduct* Rule 1.1 (1995) (requiring attorneys to utilize the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* Rule 1.2 cmt. 5 (noting that a "client may not be asked to agree to a representation so limited in scope as to violate Rule 1.1"); *id.* Rule 1.2 cmt. 4 ("Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles."); *id.* Rule 1.16(a)(1) (barring attorney from taking case that would result in violation of any ethical rule); *id.* Rule 1.16 cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion.").

stances, even one it believes will "often" occur. *See* Majority at page 11 (Plaintiffs "must establish that *no set* of circumstances exist under which the Act would be valid.") (quoting *Rust*, 500 U.S. at 183 (emphasis added)). Moreover, as the majority points out, the LSC does not fund a traditional, all-encompassing lawyer-client relationship. It has always operated under significant restrictions, and it is required to advise prospective clients of these limitations. So there is therefore "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services," Majority at pages 16-17, such as help in mounting a Constitutional challenge to a welfare statute.

*2. Supreme Court Authority*

On its face, this statute funds a program that provides certain services, and the restriction found in § 504(a)(16) (together with its exception and its proviso) prohibits grantees from rendering services that fall outside the scope of the program. The Supreme Court has recognized the undoubted power of Congress to do this. *See Rust*, 500 U.S. at 192-94, 111 S. Ct. at 1771-73; *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980).

In *Rust*, the Court considered a section of the Public Health Service Act prohibiting the use of funds appropriated for family-planning services "in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178, 111 S. Ct. at 1764-65 (quoting 42 U.S.C. § 300a-6). The Court upheld the constitutionality of that prohibition because it ensured that grantees did not engage in activities outside the scope of the program:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of view-

> point; it has merely chosen to fund one activity to the exclusion of the other.

*Id.* at 193, 111 S. Ct. at 1772. The program definition upheld in *Rust* is therefore "not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194- 95, 111 S. Ct. at 1773. Of the present case it is possible to say in paraphrase of *Rust* that the scope of the LSC project is the funding of certain individual client services, that the law does not single out any "disfavored group," and that the government has simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The error of the majority opinion arises from its inapt (and complete) reliance on *Rosenberger*, a case in which the purpose of the government program was to fund the expression of politically diverse views. The University of Virginia was defraying part of the printing costs of student publications, but denied funding to journals that promoted a religious viewpoint. The Supreme Court held that such content-based funding decisions are impermissible when the expenditure of funds is intended to facilitate private speech and thus to "encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834, 115 S. Ct. 2510, 2519 (1995). The holding of *Rosenberger* is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint. The LSC, which supports a defined program of legal representation to indigent clients, of course does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients.

*Rosenberger* does not impair the principle—explicitly announced in *Rust* and not implicated by the facts of *Rosenberger*—that when the government funds specific services it deems to be in the public interest, it may require grantees to

get with its program. The majority's surprising, short answer to this argument is that the passage from *Rust* on which I rely cannot "reliably be taken at face value." Majority at page 32. This approach to Supreme Court opinions is not one previously employed in this Circuit. I think the Supreme Court meant what it said, and that it bears repeating:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Rust*, 500 U.S. at 193, 111 S. Ct. at 1772. Recently the Supreme Court itself invoked *Rust*—and quoted that passage—to uphold restrictions on the disbursement of funds by the National Endowment for the Arts. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998) (*quoting Rust*, 500 U.S. at 193, 111 S. Ct. at 1772).

There is one sure fire way to find out whether the Supreme Court meant what it said in *Rust* and *Finley*, and now that the majority has split with the Ninth Circuit on this issue, we may not have long to wait. Relying on *Rust*, the Ninth Circuit rejected a viewpoint discrimination challenge to the LSC restrictions that are at issue on this appeal. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (Nov. 30, 1998). Justice White (part of the *Rust* majority), sitting by designation on the Ninth Circuit, wrote: "Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." *Id.* at 1028.

In an attempt to distinguish the *Rust* opinion from the *Rust* result, the majority offers the hypothetical of government-financed think tanks commissioned to study American foreign

policy, but forbidden to criticize it. This hypothetical is far removed from any program to furnish legal services; tellingly, it looks very much like the University of Virginia's student-publication program in *Rosenberger*.

A closer analogy would be presented if Congress (i) decided to out-source the advice that the Internal Revenue Service now gives taxpayers on how much taxes they owe and how much they can shelter or deduct, (ii) underwrote accountants and tax lawyers to counsel and represent qualifying middle-class taxpayers, and then (iii) discovered that the outside contractors were expending appreciable grant resources on agitation for tax reform along lines favored by the contractors and deemed by them to be in the interest of the middle classes. Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate computation of amounts due under the *present* tax code, and by barring advocacy aimed at, *inter alia*, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

The LSC restrictions, like my hypothetical statute to assist taxpayers, is not a promotion of advocacy for the good old status quo, or a suppression of a point of view. Both programs channel money to an identified public purpose, which is the administration of a complex existing statute so that everyone can get what the statute provides. I cannot imagine a more viewpoint-neutral legislative scheme.

### *B. Viewpoint Discrimination*

Considering that the majority has invalidated a statute on the ground that it constitutes impermissible viewpoint discrimination, it is odd that the majority only vaguely articulates the viewpoint that is supposedly disfavored by this legislation and (reciprocally) never states what viewpoint is favored. The fact is, the LSC subject-matter restrictions do

not lend themselves to analysis in these terms. One subsection bars funding "to provide legal assistance in civil actions to persons who have been convicted of a criminal charge . . . for the purpose of challenging the validity of the criminal conviction." 42 U.S.C. § 2996f(b)(3) (1994). Does the statute thereby "discriminate" against the "viewpoint" that prisoners have constitutional rights? Another provision bars funding "to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school." 42 U.S.C. § 2996(b)(9) (1994). Does the statute thereby "discriminate" against the "viewpoint" that schools ought to be desegregated? If limitations on classes of cases eligible for representation by LSC-financed lawyers constitute impermissible discrimination against the people who may want to advance theories in such cases, then it is hard to see how any of the many statutory limitations on LSC funds are constitutional.

By the same token, I cannot agree that the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges). *See* Majority at pages 34-36. But the proviso stricken by the majority bars representation *in lawsuits*. The viewpoints of litigating lawyers in a courtroom cannot matter for present purposes, because (among other things) the advocacy of a lawyer in litigation is at the service of the client; it would be inaccurate (and unfair) to assume that a lawyer's advocacy expresses that lawyer's personal view on politics or morals. *See Model Rules of Professional Conduct* Rule 1.2(b) (1995).

It also cannot be said that the proviso disfavors the speech of the clients; the *only* litigants who are funded are those who seek benefits. There are certainly people on the other side of welfare issues, such as those who favor narrowing welfare eligibility, or reduced benefits, or abolition of the welfare system. But the statute gives them nothing. Where then is the

viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?

The statute bars constitutional and other challenges to the welfare laws, but it certainly does not *fund* the view that the welfare laws are constitutionally impregnable. The proviso invalidated by the majority does not promote or favor any message. It lays down specifications for services to be provided to favored beneficiaries. And it excludes some of the most expensive services—constitutional litigation and statutory challenges—in the same way that the statute elsewhere bars the expenditure of LSC funds for class actions. In excluding these expensive initiatives, the statute maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits.[2] Congress is able to do that; and a statute in which Congress does that should be able to withstand a facial challenge.

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[2] By striking the proviso, the majority essentially appropriates money for the precise category of expensive (and often politically oriented cases) that Congress chose not to fund.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 98-6006
Filed July 8 1999

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of July, one thousand nine hundred and ninety-nine.

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CARMEN VELAZQUEZ et al.,

*Plaintiffs-Appellants*,

—v.—

LEGAL SERVICES CORPORATION,

*Defendant-Appellee*,

UNITED STATES OF AMERICA,

*Intervenor-Appellee*.

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of America and the appellants Carmen Velazquez et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing in banc is DENIED.

FOR THE COURT:

KAREN GREVE MILTON, Acting Clerk

/s/ RALPH A. ANDERSON 7/8/99
By: Date

RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Filed December 31, 1997
Case No. 97-CV-182 (FB) (CADEN)

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CARMEN VELAZQUEZ, WEP WORKERS TOGETHER!, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., NEW YORK CITY COALITION TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., and GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members; namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208;

FARMWORKERS LEGAL SERVICES OF NEW YORK INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208;

LUCY A. BILLINGS, PEGGY EARISMAN, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, and LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities

receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and

ANDREW J. CONNICK, COUNCILMEMBER C. VIRGINIA FIELDS, COUNCILMEMBER GUILLERMO LINARES, COUNCILMEMBER STANLEY MICHELS, COUNCILMEMBER ADAM CLAYTON POWELL, IV, SENATOR LAWRENCE SEABROOK, and ASSEMBLYMAN SCOTT M. STRINGER, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

*Plaintiffs*,

—against—

LEGAL SERVICES CORPORATION,

*Defendant*.

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MEMORANDUM AND ORDER

BLOCK, District Judge:

Plaintiffs challenge the constitutionality of certain provisions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321 (1996), which were re-enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009 (1995) (hereinafter collectively referred to as the "Act"), as implemented by regulations which were issued subsequent to the commencement of this lawsuit. The Act prohibits attorneys and organizations that receive federal monies from defendant Legal Services Corporation ("LSC") from engaging in a large number of activities (the "prohibited activities"), such as lobbying, challenging welfare reform legislation, and participating in class action litigation. The Act also provides that such LSC-funded attorney or entity ("recipients") cannot engage in any of the prohibited activities even if funding for the prohibited activity were to come from non-federal sources. However, implementing regulations issued by the LSC after the commencement of the litigation allow

recipients to engage in the prohibited activities by affiliating with legal services organizations that do not receive any federal monies from the LSC.

Presently before the Court is plaintiffs' motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.[1] Plaintiffs contend that the Act's restrictions, as implemented by the LSC's regulations, are facially violative of the First and Fifth Amendment rights of recipients, as well as attorneys for, clients of, and donors to, those recipients.[2] The Court disagrees and, regarding the implementing regulations, holds that they are a permissible construction of the Act and are appropriately tailored to the Government's legitimate interests. The Court accordingly denies the motion for preliminary injunctive relief.

## BACKGROUND

### I. The Legal Services Corporation & The Statutory Restrictions

Congress created the LSC in 1974 in response to, *inter alia*, the "need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program." 42 U.S.C. § 2996(2). The LSC is a nonprofit corporation charged with distributing federal funds, in the form of grants, to recipients nationwide that provide legal assistance to low-income individuals. In 1995, LSC recipient organizations served approximately 1,900,000 indigent clients, encompassing over 1,700,000 matters, which benefitted almost

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[1] On March 24, 1997, the Court held a preliminary injunction hearing ("Hearing") and entertained oral argument from the parties.

[2] Plaintiffs' amended complaint seeks class certification for each of these groups. The parties have agreed that the issue of class certification need not be decided pending the Court's determination of the preliminary injunction motion.

5,000,000 people living in poverty.[3] The LSC has thus been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."[4] Recipients generally rely on both LSC funds and monies raised from a variety of public and private sources[5] to finance their operations.

Despite the success of the LSC in meeting the legal needs of the poor, controversy has surrounded the LSC since its inception. This controversy has focused on the extent to which recipients should be limited in their use of LSC funds. At one end of the spectrum, critics of the LSC charge that recipients often use federal funds to advance activist agendas, and that broad limitations are necessary to ensure that LSC funds are spent to meet the basic legal needs of the poor. At the other end, opponents of such restrictions argue that activist litigation is necessary to assist impoverished individuals, and that the vast majority of LSC funds are used to help the poor in so-called "basic" legal proceedings.

In response to this debate, Congress has repeatedly placed restrictions on the permissible uses of federal funds by recipient organizations. For example, the 1974 Act prohibited the use of LSC funds by any recipient to provide legal assistance in any case seeking to obtain a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8). The 1974 Act and implementing regulations also restricted recipients from participating in the following areas: political activity, criminal proceedings, training, school desegregation, lobbying, violations of the Military Selective Service Act, and fee-generating cases. 42 U.S.C. §§ 2996f(b)(1)-(4), (6)-(10). In 1989, the LSC extended the restrictions to include redistricting cases. 45 C.F.R. § 1632. The present dispute arises from the latest round of congressional debate and compromise, which resulted in continued

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3 S. Rep. 104-392, at 13 (1996).

4 *Id.*

5 These sources include: state and local grants, IOLA (Interest on Lawyers' Accounts) programs, and private donations.

funding for the LSC, but with an additional set of restrictions on recipients of LSC funds.

Although restrictions on LSC funds have been commonplace since Congress created the LSC, the Act is unique because the restrictions apply, for the first time, to recipient activities that are supported by non-federal public funds. "Previously, recipients were allowed to use nonfederal funds from public sources as they pleased so long as accounting practices documented the segregation of federal and non-federal funds.[6] Thus, while the former statute provided that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), the new statute provides that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). Furthermore, the new statute states that recipients are free to "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act . . . ." Act § 504(d)(2)(B).

Plaintiffs' amended complaint challenges the constitutionality of the following prohibited activities set forth in the Act:[7]

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[6] Although Congress has never before prohibited recipients from using public non-LSC funds—such as grants from state and local entities and IOLA funds—to engage in prohibited activities, Congress had previously extended some of the restrictions to activities funded with private donations. 42 U.S.C. § 2996i(c); 45 C.F.R. pts. 1610, 1627 (1995). Despite this curious dichotomy, plaintiffs do not challenge the restrictions on private funds, contending that those prior restrictions on the use of private funds were insignificant since public funds constitute the "overwhelming majority" of recipients' non-LSC funds. Memorandum of Law In Support of Motion for Preliminary Injunction at 3 n.2. Therefore, the Court's reference herein to "non-LSC" funds refers to *public* non-LSC funds.

[7] Some of the restrictions are new; some were contained in prior statutes, such as lobbying. Act § 504(a)(2)-(4); 42 U.S.C. § 2996f(a)(5).

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any [recipient]:

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency [hereinafter "executive order provision"];

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect [hereinafter "agency provision"];

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body (hereinafter "legislation provision"] [subsections (2), (3), and (4) will be referred, to collectively as the "lobbying provisions"];

(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation [hereinafter "LSC oversight provision"];

(7) that initiates or participates in a class action suit [hereinafter "class action provision"];

(11) that provides legal assistance for or on behalf of [certain] alien[s] [hereinafter "aliens provision"];[8]

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor

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[8] The Act sets forth a series of exceptions, such as lawfully admitted aliens who are permanent residents. *See* Act § 504(a)(11)(A)-(F).

activity, a boycott, picketing, a strike, or a demonstration . . . [hereinafter "training provision"];

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees [hereinafter "attorneys' fees provision"];

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison [hereinafter "incarcerated client provision"];

(16) that initiates legal representation or participates in any other way . . . involving an effort to reform a Federal or State welfare system . . . [hereinafter "welfare reform provision"];

(18) unless such person or entity agrees that [it] will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action . . . [.] [hereinafter "solicitation provision"] . . . .

Act §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16), (18).

## II. Evolution of Regulations Establishing Program Integrity Requirements Governing Alternative Channels for Engaging in Prohibited Activities

### A. The Nature of the Regulations at the Time of *LASH I*

It is well-settled that the LSC has the power to promulgate rules and regulations to implement the Act. *See* Act § 503(b) ("the [LSC] shall promulgate regulations to implement a competitive selection process for the recipients"); 42 U.S.C. § 2996g(e) (requiring the LSC to publish in the Federal Register "all its rules, regulations, guidelines. and instructions"). Although the LSC was established as a federally-chartered nonprofit corporation of the District of Columbia rather than as an agency, Congress has manifested its intent to treat the

LSC as a federal agency for regulatory purposes. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 690-91 (D.C. Cir. 1991) ("We conclude that the Act clearly grants both general and specific rulemaking powers to [the] LSC . . . ."). In light of the fact that the Act's restrictions now apply to non-LSC funds, the LSC recognized in the preamble to the first set of regulations passed after the Act that new regulations were necessary:

> [These regulations] incorporate[ ] the restrictions imposed by the [Act), which apply to both a recipient's LSC funds and its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to the funds appropriated thereunder. In contrast, the [Act] prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain [of the Act's] requirements.

61 Fed. Reg. 41,960, 41,960 (Aug. 13, 1996). Central to the regulations was the section providing that "[a] recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504 . . . ." 45 C.F.R. § 1610.3 (1996).

On December 2, 1996, the LSC promulgated a revised set of regulations, 61 Fed. Reg. 63,749, which included a new regulation entitled "Transfers of recipient funds." It provided that when a recipient transferred any funds, whether from LSC or non-LSC sources, the prohibitions on use of the funds would continue to apply to those transferred funds. 45 C.F.R. § 1610.7 (1996). Comments accompanying the revised regulations explained that applying the restrictions to transferred non-LSC funds was necessary "because otherwise recipients would be able to avoid the conditions on their non-LSC funds by simply transferring the funds." 61 Fed. Reg. 63,749, 63,752 (1996).

These new and revised regulations left in place a long-standing LSC regulation entitled "Interrelated Organizations,"

50 Fed. Reg. 49,276, 49,279 (Nov. 29, 1985), which addressed the circumstances under which another organization would be deemed "controlled" by a recipient. The interrelated organizations regulation stated that "[f]unds held by an organization which . . . is controlled by . . . a recipient . . . are subject to the same restrictions as if the funds were held by the recipient." *Id.* at 49,279-80. The regulation posited eight non-exclusive factors to be weighed to determine whether control exists.[9] The Act's extension of restrictions to non-LSC funds placed heightened importance on the interrelated organizations policy since non-LSC funds of any organization that was "controlled" by a recipient were subject to all of the Act's statutory restrictions.

B. The Decision in *LASH I*

This Court is not the first federal forum to pass on the constitutionality of the Act as implemented by LSC regulations. On February 14, 1997, a federal district court for the District of Hawaii issued an order granting in part and denying in part the plaintiffs' request for preliminary injunctive relief. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (Kay, J.) (hereinafter referred to as "*LASH I*").

The *LASH I* court resolved the preliminary injunction issue through a two-part analysis. First, the court determined the

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[9] These factors were: "(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations; (b) Contractual and financial relationships; (c) History of relationships among the organizations; (d) Close identity of interest; (e) One organization has become a mere conduit, 'incorporated pocketbook,' or 'straw' party for another whether or not there was an attempt to work an injustice or promote a fraud; (f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient . . . ; (g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and, (h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions." Audit and Accounting Guide for Recipients and Auditors § 1-7, 50 Fed. Reg. 49,276, 49,279 (1985).

threshold issue of which of the challenged restrictions implicated constitutional rights, since the "*sine qua non* of [prevailing on a claim of infringement on constitutional rights] is proving that the restrictions at least implicate Plaintiffs' constitutional rights." *LASH I*, 961 F. Supp. at 1408. The court then considered whether the restrictions implicating constitutional rights actually amounted to constitutional violations. *Id.* at 1411. The parties before this Court agree that the two-part framework adopted by the *LASH I* court was appropriate. *See* Pl. Supp. Mem. of Law at 3; Def. Supp. Mem. of Law at 1 n.2. The court in *LASH I* concluded that plaintiffs had a probability of success on the merits in respect to all but three of the restrictions, which it determined did not implicate constitutional rights.

In the first phase of its analysis, the *LASH I* court examined the "laundry list" of constitutional rights plaintiffs argued were implicated by the Act's restrictions. 961 F. Supp. at 1402. The court concluded that First Amendment rights to lobby, to associate, and to meaningful court access were implicated by all but three of the challenged restrictions. Specifically, the right to lobby was implicated by the executive order provision, the agency provision, the legislation provision, and the welfare reform provision, *id.* at 1408 (Act § 504(a)(2)-(4), (16));[10] the rights of association and to meaningful court access were implicated by the training provision and the incarcerated client provision. *Id.* at 1409-10 (Act § 504(a)(12), (15)).[11]

The *LASH I* court concluded, however, that the aliens, class action, and attorneys' fees provisions did not implicate con-

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[10] The *LASH I* court also concluded that a restriction on participation in reapportionment cases implicated the right to lobby. *Id.* (Act § 504(a)(1)). Plaintiffs in this case have not challenged that provision. The Court also notes that, although apparently not challenged in *LASH I*, the LSC oversight provision, Act § 504(a)(5), also implicates the right to lobby for the same reasons as those articulated by *LASH I*.

[11] The *LASH I* court also determined that rights to meaningful court access and to associate were implicated by the restriction, not chal-

stitutional rights. The aliens provision did not implicate such rights because "[i]f Congress in its near plenary power over aliens decides that legal aid associations and their lawyers should not represent them, that decision should not be disturbed." *Id.* at 1410. As for the class actions provision, the *LASH I* court concluded that adopting plaintiffs' position would in effect constitutionalize Rule 23 of the Federal Rules of Civil Procedure, which it found "imprudent . . . absent any appellate precedent." *Id.* Finally, in respect to the attorneys' fees provision, the *LASH I* court concluded that "[p]laintiffs do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment," and that "because the provision does not implicate a suspect class, under Equal Protection the restriction need only pass rational basis which it clearly does." *Id.* at 1411.

Having found that all but three of the challenged restrictions implicated constitutional rights, the *LASH I* court proceeded to determine whether those restrictions, as implemented by LSC regulations, "not only implicate the First Amendment but whether they also impinge the First Amendment." *Id.* The court's analysis of the constitutional issue focused on the regulations promulgated by the LSC rather than the restrictions, since those regulations affected the ability of recipients to engage in activities prohibited by the Act through affiliate organizations. The court stated that "the dispositive factor . . . is whether the restrictions [leave] open adequate channels for speech. . . . [T]herefore, the Plaintiffs' likelihood of success rests on their ability to prove that the LSC restrictions prevent the organizations and lawyers from voicing their un-subsidized opinions." *Id.* at 1414.

The *LASH I* court examined the trilogy of leading Supreme Court cases on unconstitutional conditions—*Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); and *Regan v. Taxation with Representation*,

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lenged by plaintiffs in this case, on representation of persons allegedly involved in illegal drug activity in public housing eviction proceedings. *Id.* (Act § 504(a)(17)).

461 U.S. 540 (1983)—and focused its analysis on a comparison between the LSC regulations and the regulations upheld by the Supreme Court in *Rust*. The *Rust* case originated from the enactment in 1970 of Title X to the Public Health Service Act, "which provides federal funding for family-planning services." 500 U.S. at 178. The regulations at issue in *Rust* ("*Rust* regulations") were promulgated in 1988 pursuant to a provision requiring that " '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.' " *Id.* (quoting 42 U.S.C. § 300a-6).[12] The Supreme Court noted "three principal conditions on the grant of federal funds for Title X projects" created by the regulations: "[(1)] a Title X project may not provide counseling concerning the use of abortion as a method of family planning . . . [(2)] a Title X project [may not] engag[e] in activities that encourage, promote or advocate abortion as a method of family planning . . . [and (3)] Title X projects [must] be organized so that they are physically and financially separate from prohibited abortion activities." *Id.* at 179-80 (internal quotations omitted).

Although the plaintiffs in *Rust* raised several grounds for their challenge to the Title X regulations, most pertinent to the present case is the Rust Court's disposition of the claim that the Title X regulations were impermissible "because they condition the receipt of a benefit . . . on the relinquishment of a constitutional right." *Rust*, 500 U.S. at 196. The Supreme Court summarized the unconstitutional conditions doctrine as follows:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particu-

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[12] As noted, the statute at issue in the present case provides, in almost identical language, that: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any recipient that [engages in the prohibited activities]." Act § 504(a).

> lar program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

*Id.* at 197. The Court upheld the regulations on Title X projects because the regulations "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196.

The Title X regulations governing the separateness of projects engaging in restricted activities, referred to as "program integrity" requirements, mandated that to conduct prohibited abortion counseling, the grantee had to maintain separate facilities, personnel, and records for the prohibited activity. The Government defended the program integrity requirements on the grounds that "they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188.

Ultimately, the *Rust* Court rejected the unconstitutional condition claim since:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

*Id.* at 198.

The *LASH I* court therefore framed the issue as follows: "The more difficult question (and the more contested between the parties) consists of what side of the continuum this case falls with regard to *Rust*." *LASH I*, 961 F. Supp. at 1415. Ultimately, the *LASH I* court determined that the LSC regu-

lations were less flexible and more burdensome than the *Rust* regulations, concluding that "the LSC regulations fall on the unconstitutional side of *Rust*," and accordingly found that the plaintiffs were likely to prevail on the merits. *Id.* at 1416.

Of particular importance to the *LASH I* court was the combination of the expansion of the restrictions with the LSC's long-standing interrelated organizations policy. The court noted that in light of the expansiveness of the factors used to determine whether a recipient "controls" an organization, which made likely a finding of control between a recipient and any other organization in a relationship with the recipient, "the LSC regulations cannot be said to be more liberal than those in *Rust*." *Id.* In other words, "the *Rust* regulations appear far more expansive in allowing an organization to pursue" its involvement in prohibited activities through other organizations. *Id.* In its probability of success on the merits inquiry, therefore, the *LASH I* court concluded that the LSC regulations were most analogous to those in *League of Women Voters*, the only case in the unconstitutional conditions doctrine trilogy that held that adequate alternative channels were not available for the expression of First Amendment rights. *Id.*

C. The Interim Regulations Promulgated Subsequent to *LASH I*

On January 27, 1997, little more than two weeks prior to the *LASH I* decision, plaintiffs in this Court filed their amended complaint, attacking the same set of restrictions at issue in *LASH I*. In the aftermath of the *LASH I* court's holding that the challenged regulations fell on the unconstitutional side of *Rust*, on March 14, 1997 the LSC promulgated new, interim regulations which were "intended to address constitutional challenges raised by the previous rule." 62 Fed. Reg. 12,101 (1997) ("interim regulations"). Although issued after plaintiffs' amended complaint, the interim regulations were in place at the time of the preliminary injunction Hear-

ing.[13] Counsel for defendant-intervenor United States conceded at the Hearing that passage of the interim regulations was an attempt to cure the constitutional deficiencies found by the *LASH I* court, Tr.[14] at 63, and that the Court should focus its attention on the constitutionality of the new regulations. Tr. at 4 ("the playing field really has narrowed . . . what we're really debating about are whether or not the program integrity requirements and the new regulations are constitutional in light of *Rust*"); *see also* 62 Fed. Reg. 12,101, 12,101 ("limited adjustments" are intended to "respond to the constitutional concerns addressed by the [*LASH I*] Court"). Plaintiffs' counsel also conceded at the Hearing that the battle ground had really shifted to the new regulations. Tr. at 36-37 ("I don't believe it's impossible to develop a set of regulations that would permit the Government to advance the only interest that it has here.").

The interim regulations made two critical changes to the regulations in existence at the time *LASH I* was decided. First, the transfer of funds provision was revised so that transfer by a recipient of non-LSC funds would not be burdened by the statutory prohibitions. 45 C.F.R. § 1610.7. However, the LSC added a new section entitled "Program integrity of recipient." 45 C.F.R. § 1610.8. As conceded by counsel for LSC and counsel for the United States at the Hearing, the program integrity requirements were carefully patterned after those approved in *Rust*. *See* Tr. at 51 ("These are exactly the same

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[13] At the Hearing, counsel for plaintiffs argued that the *LASH I* court's analytical framework and legal conclusions were correct, with the exception of the court's holdings that three of the restrictions did not implicate plaintiffs' constitutional rights. Thus, a holding by this Court at that posture of the litigation that the interim regulations were constitutionally impermissible would have required the Court to examine those three disputed provisions. On the other hand, a determination that the regulations were sufficient to protect plaintiffs' constitutional rights would render academic the issue of which of the Act's restrictions implicated the constitution in the first instance.

[14] "Tr." refers to the transcript of the preliminary injunction Hearing.

kinds of regulations from *Rust* . . . . In fact, the language of them is exactly the same.") (statement by counsel for LSC); Tr. at 63 ("The folks at LSC sat down and they promulgated regulations. They asked themselves how to do it, and what they did is they looked at what the Supreme Court said in *Rust* and they did their level best to copy from *Rust*.") (statement by counsel for United States).

Program integrity requirements regulate the ability of recipients to maintain a relationship with organizations, often referred to as "affiliates," that do not receive any LSC funds and engage in activities prohibited by the Act. Unlike organizations "controlled" by recipients, which are deemed to be LSC actors, affiliates can maintain a relationship with a recipient yet engage in prohibited activities. As in *Rust*, the use of affiliates under the interim regulations was intended to strike a balance between providing an outlet to engage in advocacy prohibited by the Act and maintaining the integrity of the Act by ensuring that no LSC funds would be used to subsidize prohibited activities in violation of congressional intent. The program integrity requirements section of the interim regulations reads, in pertinent part:

> [The Act's restrictions will not be applied to an affiliate if it] is physically and financially separate from the organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. In order to be physically and financially separate, the recipient and the [affiliate] must have an objective integrity and independence from one another. Factors considered to determine whether such objective integrity and independence exist shall include, but are not limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The existence of separate facilities; and

> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] are present.

45 C.F.R. § 1610.8(b)(3).

Although based on the *Rust* program integrity requirements, the interim regulations did not exactly mirror those requirements. Several differences between them are noteworthy because they formed the basis of plaintiffs' position at the time of the Hearing that the program integrity requirements were unconstitutional in part because they were more restrictive than the *Rust* program integrity regulations.

First, in addition to the program integrity requirements, a separate section in the interim regulations perpetuated the LSC's former "interrelated organizations" policy. The regulation provided in that regard:

> If a recipient controls, is controlled by or is subject to common control with another organization, the two organizations are interrelated organizations and the restrictions in this part will be applied to both organizations, unless the association between the two organizations meets the standards of program integrity in paragraph (b) of this section.

45 C.F.R. § 1610.8(a). This provision formally replaced the LSC's prior "interrelated organizations" regulation. 62 Fed. Reg. 12,101, 12,101 (1997). Under this new provision, therefore, an organization could be "controlled" by a recipient yet engage in prohibited activities so long as the program integrity requirements were satisfied. Despite this exception, no provision regarding control appeared in *Rust*'s program integrity requirements, and plaintiffs argued that this provision contributed to the regulation's constitutional infirmity. *See* Plaintiffs' Reply Memorandum at 8-9.

The second difference between the interim and *Rust* program integrity requirements concerns one of the four factors used in the program integrity analysis—namely, the separateness of the recipient's and affiliate's facilities. In *Rust*, the

regulation stated that the "degree of separation" of facilities would be considered, whereas the interim regulation required the "existence" of separate facilities. Plaintiffs argued that "[t]his difference appears to be more than semantics," *id.* at 10, and that "[u]nlike the [*Rust* regulation], which measured the *degree* of separation, the LSC rule focuses on the *existence* of separate facilities." *Id.*

Third, the *Rust* program integrity requirements stated that the determination of whether a recipient and affiliate were sufficiently separate would be based on all "facts and circumstances," whereas the interim regulations made no such statement, which arguably implied that in order to show objective integrity, a recipient would have to satisfy each and every program integrity factor. Plaintiffs emphasized that unlike the *Rust* program integrity requirements, which "made it clear that [each of the four considerations] was only one factor in the assessment of program integrity;" the interim regulations appeared to establish a "*per se* test." *Id.* Based on all these differences between the interim regulations and the *Rust* program integrity requirements, plaintiffs concluded that the LSC restrictions on the use of affiliates "go[ ] far beyond the simple segregation requirements of *Rust*." *Id.* at 12.

The Court asked plaintiffs' counsel at the Hearing whether it might be provident to withhold judgment until the final regulations were promulgated, commenting:

> [T]hese are interim regulations. Is there not some wisdom in allowing some period of time to let the dust settle until we get final regulations? They may come in a different form two months from now or three months from now. You may have to come back to this or another court to deal with a whole different spate of regulations.

Tr. at 8. The colloquy continued as follows:

> [PLAINTIFFS]: If there's any change, we'll let you know immediately, but I should say, I don't anticipate that there will be a significant change. We think that these are the reg-

ulations that we're going to be operating on into the foreseeable future.

THE COURT: You know, there were a spate of new regulations after Judge Kay [in *LASH I*] spoke. Maybe after we have this argument today, there will be more regulations.

Tr. at 10. At the conclusion of the Hearing, the Court, noting the responsiveness of the rulemaking process to the *LASH* litigation, commented:

> Maybe as a result of this opportunity for all of us to discuss these issues, there can be some further way in which these matters can be addressed, or there will be an ongoing dialogue between people of good will and good spirit in our great profession. If [this Hearing] has possibly facilitated that possibility, I feel that's also a purpose to be served from my end of the spectrum . . . .

Tr. at 68.

D. The Final Program Integrity Requirements

On May 21, 1997, the LSC replaced the interim regulations with what it termed the "Final rule," which made revisions to the interim rule "[b]ased on [comments received by the LSC] and its own internal research and review." 62 Fed. Reg. 27,695, 27,695 (May 21, 1997) ("final regulations"). The Court therefore will treat plaintiffs' motion as directed at the final regulations rather than the regulations analyzed in *LASH I* or the interim regulations issued shortly after *LASH I* and in effect at the time of the Hearing. In particular, the Court focuses on the revised program integrity requirements, which plaintiffs contend are still overly restrictive in a manner which renders them facially unconstitutional.

The program integrity section of the final regulations provides as follows:

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity ["separate entity requirement"];

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities ["no subsidy requirement"]; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present [collectively the "separation factors"].

45 C.F.R. § 1610.8(a). Significantly, subsection (b) of § 1610.8 provides that recipients must certify to the LSC their compliance with the program integrity requirements.

The revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements. First, the final requirements deleted the provision regarding control of an affiliate by a recipient. The LSC removed the provision because "the [LSC] determined that if a program is found to be in compliance with the [remainder of the] program integrity test, there would be a sufficiently separate identity and operational independence from the recipient. 62 Fed. Reg. 27695, 27697.

The final regulations made two further changes intended to bring the program integrity requirements exactly in line with *Rust*. First, the separate facilities factor was changed from "the existence of separate facilities" to "the degree of separation from facilities in which restricted activities occur." And second, the LSC added language to emphasize that there is no *per se* rule in respect to the factors relevant to the program integrity determination. In fact, the new language is even less restrictive than the *Rust* regulation since it states that "[t]he presence or absence of any one or more factors will not be determinative."

The Court notes that, despite the similarity between the program integrity requirements in *Rust* and the LSC's final regulations, the *Rust* regulations placed further restrictions on federally-funded family planning projects which have no counterpart in the LSC regulations. First, the *Rust* regulations limited the content of a doctor's advice to the project's client; specifically, Title X doctors were forbidden from advising women regarding abortion. *Rust*, 500 U.S. at 179 (citing 42 C.F.R. § 59.8(a)(1) (1989)). Second, doctors were absolutely prohibited from referring clients to a project which performed abortions, which included any affiliate of the project. *Id.* at 179-80 (citing 42 C.F.R. § 59.8(a)(2)). And third, doctors were banned from even explaining to the patient that the content of the advice given was being curtailed by an administrative rule. *Id.* at 180 (citing 42 C.F.R. § 59.8(b)(5)).

Notably, although the LSC chose to incorporate the program integrity requirements from *Rust* into the final regulations, it did not carry over from *Rust* any specific restrictions on: (1) counseling the client; (2) referring the client to another group, such as the recipient's affiliate; and (3) explaining to the client that it cannot perform the prohibited activity because it is barred by LSC regulation. Since the Act itself does not state whether the prohibited activities, most of which are actions taken outside of the recipient's office, are intended to encompass legal advice, referral to affiliates, and explanation about the Act, the Court interprets the LSC's decision not to carry over these additional restrictions from the *Rust* regulations as an implicit approval of these three activities. Counsel for the LSC recognized this interpretation as the LSC's position in a letter to the Court:

> [In contrast to *Rust*], the statutory restrictions at issue here (as implemented by LSC's regulations) do not prevent LSC-subsidized lawyers from fully advising their clients of their legal rights and practical options; indeed, the restrictions do not inhibit lawyers' *speech* to their clients at all. For example, an LSC lawyer is free to advise potential clients that their case is best suited for class action treatment, or that they may have a claim that a welfare law is unconstitutional. The lawyer is also permitted to advise potential clients that while the LSC-funded entity cannot take the case, the lawyer knows of other attorneys who can. Therefore, unlike the women in *Rust*, who received "skewed' information, the clients of LSC-subsidized lawyers receive complete information.

Letter to the Court from Alan Levine, dated March 31, 1997 at 2.

## III. *LASH II*

Following the issuance of the final program integrity requirements, the LSC moved for summary judgment in the

Hawaii court, contending that the final revisions made by the LSC brought the regulations into complete conformity with the *Rust* program integrity requirements, thereby compelling a determination that the final program integrity requirements were no more burdensome on plaintiffs' constitutional rights than those at issue in *Rust*. The Hawaii court agreed. In an Order dated August 1, 1997, the court dissolved the previously entered preliminary injunction as moot, and granted LSC's motion. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, ___ F. Supp. ___, 1997 WL 641051 (D. Haw. Aug. 1, 1997) ("*LASH II*").

The *LASH II* court began its analysis by noting that the LSC regulations on interrelated organizations had been substantially modified by the interim and final regulations, and that the issue in the case had therefore been reduced to the following:

> [D]oes a legal aid organization's ability to control a separate legal organization with separate personnel and facilities provide an alternative channel for the exercise of the first legal aid organization's constitutional rights as required by the unconstitutional conditions doctrine.

*Id.* at *4. The *LASH II* court summarized its First Amendment holding by emphasizing that the ability of recipients to exercise control over affiliates constituted an adequate alternative channel for exercising their First Amendment rights:

> The Court reads the new regulations as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied. With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature. Thus, the LSC-funded legal aid societies will be able to control affiliates who care for the needs of the

poor in areas from which the regulations restrict the societies.

*LASH II* at *1.

In reaching this conclusion, the court rejected a number of arguments advanced by the plaintiffs in their effort to distinguish *Rust*. First, in respect to the insularity requirements, the court rejected plaintiffs' contention that *Rust* only upheld requirements beyond mere bookkeeping separation because it is more difficult for doctors than lawyers to account for their time. The court held that "[i]t is no more difficult for a doctor to categorize his conversation with a patient than it is for a lawyer to do so with his client." *Id.* at *4.

The court then summarily rejected the argument that *Rust* was distinguishable because the Act was not intended to convey a Government message, stating that "Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in certain areas such as abortion." *Id.* at *5. The court then considered the claim that since litigation, unlike communication in a doctor's office, is a traditional sphere of expression, *Rust* cannot control. The court noted that, even assuming litigation was a traditional sphere of expression, restrictions on those forms of expression are not *per se* unconstitutional; rather, such expression is subject to First Amendment vagueness and overbreadth doctrines. The court did not address the issues of overbreadth or vagueness since it determined that plaintiffs "have not alleged that the restrictions are vague or overbroad." *Id.*

The *LASH II* court then noted that the final program integrity requirements were more restrictive than the *Rust* regulations insofar as the affiliate of LSC recipients had to be separately incorporated. This difference, the court determined, was insubstantial in light of the approbation given to such a requirement by the Supreme Court in *Regan v. Taxation With Representation*, 461 U.S. 540, 544 n.6 (1983) (noting that such a requirement is not "unduly burdensome"). The court thus concluded that "[t]he requirement of separate

incorporation does not in any significant way add to Plaintiffs' burdens." 1997 WL 641051, at *8.

Finally, the *LASH II* court dismissed plaintiffs' due process and equal protection arguments. The due process claims were rejected primarily on the ground that, as dictated by *Rust*, "Congress' refusal to fund the restricted activities here leaves the indigent clients with the same choices they would have had absent the creation of the LSC." *Id.* at *11. The court therefore concluded that "the regulations cannot be deemed to 'impermissibly burden' whatever Due Process rights the client may have." *Id.* The court also emphasized that the "ample alternative channels" provided by the regulations significantly diminished the impact of the restrictions on indigent clients. *Id.* at *12. Turning to the equal protection claims, the *LASH II* court rejected these contentions for two reasons. First, since poverty is not a suspect classification, any discrimination against the poor need only have a rational basis to survive an equal protection challenge. The court had no trouble finding that the regulations passed the rational basis level of scrutiny. *Id.* And second, the court dispelled the notion that the equal protection clause was violated because of "discriminatory distribution of fundamental rights," noting the "long line of cases holding that the government need not fund the exercise of a fundamental right." *Id.* (citing *Harris v. McRae*, 448 U.S. 292, 315 (1980)).

## ISSUES CURRENTLY BEFORE THE COURT

Although there have been no submissions by the parties addressing *LASH II*, based upon prior submissions to the Court plaintiffs presumably would not concur in *LASH II's* approbation of the final regulations, except in respect to the separate incorporation requirement, which they do not contest. Plaintiffs' contentions embrace the arguments made by the plaintiffs in *LASH II*, but are in a number of respects more expansive. As best the Court can glean from the memoranda of law, oral argument, and a number of post-Hearing letters

submitted both before and after the adoption of the final regulations, the following issues are fairly presented to the Court in the context of plaintiffs' preliminary injunction application: (1) can the LSC lawfully adopt regulations to guard against the appearance that the Government endorses the prohibited activities; (2) if so, are the regulations enacted by the LSC, specifically the "separate personnel" and "degree of separate facilities" program integrity requirements, properly drawn to address that interest considering the differences, such as they are, between the Title X proscriptions in *Rust* and the impact in this case on the legal profession and the attorney-client relationship; and (3) do any of the restrictions or regulations violate the Due Process or Equal Protection clause of the Fifth Amendment?

## DISCUSSION

### I. Preliminary Injunction Standard

Generally, in order to obtain preliminary injunctive relief, a plaintiff must show "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). However, when a plaintiff seeks to enjoin " 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' " plaintiffs must meet the stricter "probability of success" standard. *Id.* (quoting *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)); *see also Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (When seeking to enjoin such governmental action, plaintiffs "cannot resort to the 'fair ground for litigation' standard."). Plaintiffs recognize that, since they seek to enjoin the LSC's enforcement of regulations issued pursuant to a statutory scheme, they must demonstrate a probability of success on the

merits. Memorandum of Law in Support of Motion For Preliminary Injunction at 6.

Since the parties all appropriately agree that the final regulations implicate plaintiffs' First Amendment rights, the key inquiry is whether they go so far as to actually violate those rights. The Court recognizes that, if plaintiffs' First Amendment rights are violated, then they almost certainly have established irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.").

II. Permissibility of the Final Regulations

All parties agree that as a consequence of enactment of the subject regulations after the commencement of plaintiffs' lawsuit challenging the constitutionality of the Act, the focus of this litigation has essentially shifted. Indeed, plaintiffs acknowledge that the Court's principal inquiry is to now determine whether the regulations constitutionally "provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds." Plaintiffs' Reply Memorandum at 2. However, before turning to the constitutionality of the Act as implemented by the final regulations, the Court must determine the threshold issue of whether those regulations constitute a *permissible* construction of the Act by the LSC. *See Rust*, 500 U.S. at 183-87. This requires an analysis of whether the final regulations are consistent with the Act's language and congressional intent. *Id.*

Plaintiffs contend that the program integrity requirements are not a permissible construction of the Act because they require more than "maintain[ing] accurate time and expense records distinguishing restricted from unrestricted activities . . . so that LSC could verify that federal funds were not spent on restricted activities." Plaintiffs' Supplemental Memorandum of Law at 6. From the plaintiffs' perspective, the only permissible regulation the LSC can implement to ensure

separation between the recipient and affiliate is the imposition of such "bookkeeping" requirements.

The Court's permissibility analysis is guided by the broad-based principle of administrative law that when reviewing an agency's construction of a statute which does not "directly [speak] to the precise question at issue," the court must bear in mind that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1994). Moreover, "[i]n determining whether a construction is permissible, '[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.' " *Rust*, 500 U.S. at 184 (quoting *Chevron*, 467 U.S. at 843 n.11). Furthermore, the Court notes that the United States Court of Appeals for the District of Columbia Circuit has held that LSC regulations are entitled to full *Chevron* deference. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 689-90 (D.C. Cir. 1991) ("We conclude that the basic principles of *Chevron* apply to the statutory scheme created by the Act and the role contemplated for LSC under it.").

*Chevron*'s canon of deference to agency interpretations is applicable to this case because nothing in the Act speaks to the precise question of how, or even whether, program integrity requirements can be maintained. *See Rust*, 500 U.S. at 184 (the statute "does not speak directly to the issue[ ] of . . . program integrity"). The Act gives no indication as to the steps a recipient must take to separate its LSC-authorized activity from its engagement in prohibited activity funded by non-LSC sources. The Court therefore turns to the question of whether the LSC's interpretation of the Act is consistent with the Act's language and underlying intent.

The Court rejects plaintiffs' proposed construction of the Act because it would undermine the Act's attempt to achieve a significant measure of separation between recipients and the

prohibited activities. The Government interest underlying the Act is broader than just preventing the subsidization of prohibited activities with federal funds—indeed, if that were the case, there would be no need to restrict the use of *non*-LSC funds at all. Rather, the Act reveals an additional interest—preventing the *appearance* of Government endorsement of the prohibited activities.

Congress' intent to prevent the appearance of endorsement through passage of the Act is supported by two facts. First, the difference between the wording of the Act and its predecessors reflects Congress' intent to move beyond recipients' prior practice of using nothing more than accounting procedures to document compliance with the statutory proscriptions on using federal funds for prohibited activities. Specifically, the pre-Act statutory language focused on the subsidization interest by providing that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), whereas the Act states that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). This broader language evinces an intent to distance recipients of any LSC funds from all of the prohibited activities rather than merely tracing the path of federal funds.

The second indication of this intent is contained in the Senate Report which accompanied the Act when it was reported out of the Committee on Labor and Human Resources:

> [The Act] also bans LSC attorneys from using nonfederal funds for any purpose prohibited by the LSC Act, as amended. There are two important justifications for this restriction. First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of

> watching LSC attorneys lobby legislators—even if that dismay might sometimes be misplaced.

S. Rep. No. 104-392, at 6 (1996). That the LSC shares this view of the Government interests at stake is confirmed by the preamble to the interim regulations:

> [The program integrity requirements] are necessary to ensure that there is no identification of the recipient with restricted activities and that the [affiliate] is not a sham or paper organization and is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

62 Fed. Reg. 12101, 12102. Under the plaintiffs' interpretation, the Act would have no practical impact on the day-to-day operations of recipient organizations. Recipient organizations could simply continue to use non-LSC funds for prohibited activities, label such as the actions of their "affiliate," and keep accounting records to document this nominal separation. Surely Congress did not intend such a meaningless change in the law.

Applying *Chevron* deference to the LSC's interpretation of the Act, the Court concludes that the final regulations are consistent with the Act's language and intent, and therefore constitute a permissible construction of the Act. The Court rejects plaintiffs' counter-interpretation as contrary to congressional intent to achieve both a monetary and clearly identifiable separation between recipients and affiliates.

It is also apparent that Congress may always lawfully decide to disassociate itself from the appearance of endorsement of activities it chooses not to subsidize. Thus, in *League of Women Voters*, the Supreme Court noted that "the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government." 468 U.S. at 395. Similarly, the Court in *Rust* implicitly gave its approbation to the Government's con-

tention that program integrity requirements "are necessary to assure that Title X grantees . . . avoid creating the appearance that the Government is supporting abortion-related activities," 500 U.S. at 188.

III. Constitutionality of the Act as Implemented by the Final Regulations

Plaintiffs contend that the program integrity requirements are not appropriately tailored to the Government's interest in avoiding the appearance of endorsement. They argue, specifically, that the insularity requirements—separate personnel and degree of separate facilities—while embraced by the Court in *Rust*, have no warrant in the context of the lawyer-client relationships and the nature of the prohibited activities in this case. They distinguish *Rust* as follows:

> The Title X regulations applied to a doctor counseling a patient alone in the doctor's office and the prohibition to be effectuated by those regulations was preventing the doctor from counseling abortion, when funded by the Government. In that context, considerations of separate personnel and separation of facilities, and signs and other forms of identification were relevant to making sure that the patient understood that when she was receiving abortion counseling at the same family planning clinic, it was not supported by federal funds.

Letter to the Court from Peter M. Fishbein, dated June 5, 1997.

By contrast, plaintiffs contend that the restricted activities here at issue "are actions to be taken outside the office," namely "in courts, administrative agencies or legislative bodies," and that the appearance that these activities are being carried out with LSC funds can be obviated "simply by requiring that the papers filed or the advocate making the presentation clearly identify that the activity is being carried out by the entity that is not funded by LSC." *Id.*

In addition, plaintiffs attack the final regulations as "vague and unworkable" because "arrangements will be assessed 'on a case-by-case basis' and determinations 'will be based on the totality of the facts.' " Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997. Accordingly, plaintiffs conclude that the "LSC has created a standardless world in which the only rational judgment a Legal Services program could possibly make is not to enter into an affiliate relationship or, once it did, not tinker with it." They contend that the "LSC can easily draft regulations that provide more guidance to recipients of LSC funds." *Id.*

Plaintiffs' arguments cannot carry the day for a number of reasons. Initially, when dealing with an interest that is viewpoint neutral and not aimed at suppressing vital, fundamental constitutional rights, the Government need only show "a 'fit' between the legislature's ends and the means chosen to accomplish these ends . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)); *see also Rust*, 500 U.S. at 195 n.4; *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This would appear to be the proper standard to apply when evaluating whether regulations are properly drawn to protect the Government's interest in avoiding the perception of endorsement of programs which it does not subsidize.

Moreover, in order to sustain their facial challenge to the final regulations' program integrity requirements, plaintiffs "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' " *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (quoting *Taxpayers for Vincent*, 466 U.S. at 798); *see also Sanitation and Recycling*

*Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997); *Rust*, 500 U.S. at 183 ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The Court does not find persuasive plaintiffs' contention that the "separate personnel" and "degree of separate facilities" requirements, each of which are limited to the office environment, are irrelevant to the Government's asserted interest in preventing the appearance of endorsement because the prohibited activities all take place in a courtroom or other forum outside of recipients' offices and that, in any event, a mere disclaimer would be sufficient. Contrary to plaintiffs' assertion, many integral aspects of engaging in prohibited activities take place in the recipients' office, such as: taking depositions, drafting pleadings, and preparing witnesses for trial. It simply cannot be said that potential clients, opposing attorneys, and other visitors to the recipient's office would not be exposed and vulnerable to the perception, absent separate personnel and facilities, that the Government supports the prohibited activities. Furthermore, the suggestion by plaintiffs that a mere disclaimer on documents submitted to courts and legislatures is sufficient to prevent the appearance of endorsement does not square with reality. Although judges and law clerks, as well as legislators and their aides, might notice the disclaimer, it is unlikely that the media would report the disclaimer to the public. Moreover, even if the disclaimer was announced at the commencement of or intermittently during a judicial or legislative proceeding, there is simply no reasonable assurance that members of the public attending various stages of the proceeding would be privy to the announcement.

Plaintiffs' contention that the regulations which direct the LSC to make determinations of program integrity on a case-by-case basis and not to place determinative weight on any one factor render them "vague and unworkable" fails as well, especially in light of *Rust*. Indeed, this contention runs directly contrary to the argument plaintiffs made in their reply memorandum, which criticized the interim regulations for imposing a rigid "*per se* test" rather than adopting from *Rust* a flexible test where no one factor would be determinative. Plaintiffs' Reply Memorandum at 10. Now that the LSC has revised their regulations to incorporate the same—degree of flexibility as the *Rust* regulations, plaintiffs protest that the regulations are unworkable. Plaintiffs' abrupt about-face undermines the integrity of their reconstituted position. In any event, the *Rust* Court specifically noted, and gave its implicit approval to, the fact that the program integrity factors were "nonexclusive" and were to be applied through "case-by-case" determinations. 500 U.S. at 181. Nor are the program integrity requirements "void for vagueness." The separation factors give fair warning to recipients of the standards by which their program integrity compliance certifications will be evaluated. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *cf. Finley v. National Endowment for the Arts*, 100 F.3d 671, 681 (9th Cir. 1996) (striking down as unconstitutionally vague funding criteria requiring that art works show "decency and respect for the diverse beliefs and values of the American public"), *cert. granted*, ___ S. Ct. ___, 1997 WL 561768 (Nov. 26, 1997). They are "sufficiently clear that the speculative danger of arbitrary enforcement does not render [them] void for vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

In respect to the recipients' program integrity compliance certifications, 45 C.F.R. § 1610.8(b), the LSC presumably will attach significant credence and presumptive validity to such certifications by recipient organizations, which are in the main staffed and/or supervised by members of the bar. This will undoubtedly minimize the prospects of "as applied"

litigation challenges. The Court therefore determines that the "case-by-case basis" and "no one factor's determinative" language, in conjunction with the separation factors, are appropriately tailored to advance the Government's interest in preventing the appearance of endorsement, and accordingly do not render the regulations facially invalid.

Nor, in a similar vein, can the regulations be considered unconstitutionally overbroad. The Second Circuit has recently emphasized that overbreadth challenges are to be accepted "sparingly and only as a last resort," *Sanitation and Recycling Indus., Inc.*, 107 F. 3d at 997 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)), and that such a challenge "may prevail only if plaintiffs can show that an impermissible risk is created that ideas may be chilled whenever" the law is applied. 107 F.3d at 997. Further, "invalidation of a statute on its face is permitted 'only if the overbreadth is substantial.' " *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 660 (2d Cir. 1995) (quoting *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)); *see also Dorman v. Satti*, 862 F.2d 432, 436 (2d Cir. 1988) ("An act's overbreadth 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' ") (quoting *Broadrick*, 413 U.S. at 615). This Court has not hesitated to invoke the overbreadth doctrine in the fare of a facial constitutional challenge whenever a challenged regulation "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected constitutional rights. *See Scott v. Goodman*, 961 F. Supp. 424, 427 (E.D.N.Y. 1997) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Such, however, is plainly not the present case since neither the Act nor the regulations can plausibly be perceived as having such a preclusive effect upon the exercise of the plaintiffs' or third parties' First Amendment rights.

Having determined that the program integrity requirements are appropriately tailored to advance the Government's legitimate interest in preventing the appearance of endorsement

and that they are not overbroad, the Court now turns its attention to plaintiffs' overarching argument that "the affiliate rules in *Rust* do not provide the benchmark where, as here, the restrictions strike at the heart of activities that are laden with First Amendment value." Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997 (quoting Plaintiffs' Reply Memorandum at 2).

There is no quarrel amongst the parties, nor could there be, that when the Government imposes upon the time-honored functions of the lawyer and, in particular, the lawyer-client relationship, it treads deeply in waters bound up in First Amendment sensibilities. As the Court in *LASH I* correctly assessed, the restrictions embodied by the Act impact, under the umbrella of the First Amendment, a broad range of rights affecting the pursuit and vindication of legal interests, including the right to lobby legislators and administrators, access to the courts, and even the confidential nature of the relationship between lawyers and prospective clients. *LASH I*, 961 F. Supp. at 1408-09. Because of the spate of new restrictions which Congress has now added to its prior restrictions upon LSC recipients, and the broad range of First Amendment rights arguably impacted by these restrictions, plaintiffs contend that *Rust* is not an appropriate analogue since the limited and narrowly drawn abortion counseling constraints did not significantly, if at all, impinge on the doctor-patient relationship. By contrast, plaintiffs assert that the profundity of the lawyering restrictions here at issue do indeed affect the fundamental nature of lawyering and the attorney-client relationship.

The Court in *Rust* recognized that there are certain traditional spheres of free expression "so fundamental to the functioning of our society" that the Government's ability to restrict basic First Amendment rights within that sphere by attaching conditions to the expenditure of Government funds "is restricted by the vagueness and overbreadth doctrines of the First Amendment," meaning in that context that the restriction, if justified at all, must be especially precise. *Rust*,

500 U.S. at 200 (citing *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-06 (1967) ("We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' " 385 U.S. at 603, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)). The *Rust* Court surmised by analogy that it could be argued "that traditional relationships such as that between doctor and patient should enjoy [special] protection under the First Amendment from Government regulation, even when subsidized by the Government." *Id.* The lawyer-client relationship obviously is at least on equal First Amendment footing with the doctor-patient relationship, and given the panoply of the constitutional rights of association and speech adhering to the attorney-client relationship, one could conceivably argue that the First Amendment is even more caught up in the lawyer-client relationship than the doctor-patient relationship.

The Court in *Rust*, however, did not deem it necessary to explore the nature of the doctor-patient relationship since it was of the opinion that the Title X program regulations did not 'significantly impinge" upon that relationship because "[n]othing in them requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* In that respect, the Court attached significance to the fact that the regulations did not preclude the doctor from advising the patient that "advice regarding abortion is simply beyond the scope of the program." It concluded, therefore, that "[i]n these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

While the Court obviously has reverence for the majesty of the law, the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship, especially when contrasted with Title X's proactive aspects. Indeed, they simply proscribe the activities in which LSC recipients may engage.[15] Moreover, the extent of the activities

[15] For this reason, the Court also rejects plaintiffs' contention that *Rust* is distinguishable because here recipients are not acting as Gov-

which LSC recipients are prohibited from engaging in cannot enter into the constitutional mix since it is bedrock law that Congress need not fund the exercise of constitutional rights, regardless of their magnitude. *See Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers*, 485 U.S. 360, 368 (1988) ("We have held in several contexts [including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983)). It matters not, therefore, whether one or more activities are proscribed since the numerosity of prohibited activities is not correlated to constitutional concerns. Furthermore, in contrast to the limited nature of doctor-patient counseling provided for in *Rust*, the regulations, as interpreted by LSC's counsel, broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake. The Court will take the LSC at its word and will take a critical view, as other courts should as well, of any restrictions on such basic lawyering, in addition to any unreasonable rejections of recipients' certificates of compliance with the program integrity requirements, if such issues should arise in any future "as applied" litigation.

In respect to plaintiffs' rather casual due process and equal protection claims, their due process argument fails for the same reasons the analogous claim failed in *Rust*—namely,

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ernment "mouthpieces." Tr. at 4647. As the Supreme Court recently clarified in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-30 (1995), the "government as speaker" analysis is only implicated when the Government engages in viewpoint, rather than content, discrimination. Congress can constitutionally define the scope of its funding programs by excluding subject matter regardless of whether it is attempting to convey a particular message. *Cf. Rosenberger*, 515 U.S. at 831 ("By the very terms of the [regulation], the [government] does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program. 500 U.S. at 201-02. The Court rejects plaintiffs' equal protection argument since, as explained throughout this decision, the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification. *See LASH II*, 1997 WL 641051, at *12; *see also Maher v. Roe*, 432 U.S. 464, 471 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection" analysis).

## CONCLUDING COMMENTS

This is not the same case that first came to the Court. It was entirely plausible for plaintiffs to initially challenge the constitutionality of the laundry list of prohibited activities wrought by the Act. Regardless of whether the Court would have agreed with all or any part of its sister court's constitutional conclusions in *LASH I*, this litigation, as plaintiffs have acknowledged, took on vastly different contours once the LSC responded to the compelling concerns raised in *LASH I* by enacting the interim regulations, and further responded in its final regulations to the plaintiffs' concerns regarding the interim regulations and to the Court's entreaties during the course of the litigation. In many ways, the litigation stands as a testament to the continued vibrancy and vitality of the very First Amendment rights at the heart of this lawsuit—access to the courts, free and open public debate, and freedom to associate for the vindication of legal rights. It also reflects the value of advocacy in the judicial setting by protagonists acting at the highest level of the legal profession. In that regard, plaintiffs are commended for bringing and furthering this litigation; defendants are commended for appropriately addressing plaintiffs' concerns.

## CONCLUSION

Plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge, and their preliminary injunction motion is therefore denied.

/s/ FREDERIC BLOCK
FREDERIC BLOCK
United States District Judge

DATED: Brooklyn, New York
December 22, 1997

## Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and $7,100,000 is for management and administration: *Provided,* That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) Funds appropriated under this Act to the Legal Services Corporation for basic field programs shall be distributed as follows:

(1) The Corporation shall define geographic areas and make the funds available for each geographic area on a per capita basis relative to the number of individuals in poverty determined by the Bureau of the Census to be within the geographic area, except as provided in paragraph (2)(B). Funds for such a geographic area may be distributed by the Corporation to 1 or more persons or entities eligible for funding under section 1006(a)(1)(A) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)), subject to sections 502 and 504.

(2) Funds for grants from the Corporation, and contracts entered into by the Corporation for basic field programs, shall be allocated so as to provide—

(A) except as provided in subparagraph (B), an equal figure per individual in poverty for all geographic areas, as determined on the basis of the most recent decennial census of population conducted pursuant to section 141 of title 13, United States Code (or, in the case of the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, Alaska, Hawaii, and the United States Virgin Islands, on the basis of the adjusted population counts historically used as the basis for such determinations); and

(B) an additional amount for Native American communities that received assistance under the Legal Services Corporation Act for fiscal year 1995, so that the proportion of the funds appropriated to the Legal Services Corporation for basic field programs for fiscal year 1996 that is received by the Native American communities shall be not less than the proportion of such funds appropriated for fiscal year 1995 that was received by the Native American communities.

(b) As used in this section:

(1) The term "individual in poverty" means an individual who is a member of a family (of 1 or more members) with an income at or below the poverty line.

(2) The term "poverty line" means the poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)) applicable to a family of the size involved.

SEC. 502. None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is—

(1) a private attorney admitted to practice in a State or the District of Columbia;

(2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that

(A) furnishes legal assistance to eligible clients; and

(B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who—

(i) are admitted to practice in a State or the District of Columbia; and

(ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;

(3) a State or local government (without regard to section 1006(a)(1)(A)(ii) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)(ii)); or

(4) a substate regional planning or coordination agency that serves a substate area and whose governing board is controlled by locally elected officials.

SEC. 503. (a)(1) Not later than April 1, 1996, the Legal Services Corporation shall implement a system of competitive awards of grants and contracts for all basic field programs,

which shall apply to all such grants and contracts awarded by the Corporation after March 31, 1996, from funds appropriated in this Act.

(2) Any grant or contract awarded before April 1, 1996, by the Legal Services Corporation to a basic field program for 1996—

(A) shall not be for an amount greater than the amount required for the period ending March 31, 1996;

(B) shall terminate at the end of such period; and

(C) shall not be renewable except in accordance with the system implemented under paragraph (1).

(3) The amount of grants and contracts awarded before April 1, 1996, by the Legal Services Corporation for basic field programs for 1996 in any geographic area described in section 501 shall not exceed an amount equal to $^{3}/_{12}$ of the total amount to be distributed for such programs for 1996 in such area.

(b) Not later than 60 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate regulations to implement a competitive selection process for the recipients of such grants and contracts.

(c) Such regulations shall specify selection criteria for the recipients, which shall include—

(1) a demonstration of a full understanding of the basic legal needs of the eligible clients to be served and a demonstration of the capability of serving the needs;

(2) the quality, feasibility, and cost effectiveness of a plan submitted by an applicant for the delivery of legal assistance to the eligible clients to be served; and

(3) the experience of the Legal Services Corporation with the applicant, if the applicant has previously received financial assistance from the Corporation,

including the record of the applicant of past compliance with Corporation policies, practices, and restrictions.

(d) Such regulations shall ensure that timely notice regarding an opportunity to submit an application for such an award is published in periodicals of local and State bar associations and in at least 1 daily newspaper of general circulation in the area to be served by the person or entity receiving the award.

(e) No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process.

(f) For the purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency

if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiv-

ing Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation:

*Provided,* That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: *Provided further,* That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or

encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if—

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and. for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that board, of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from—

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made,

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to a afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal

assistance for a. case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act—

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection (a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11), and (15) of section 504(a) shall apply—

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a)—

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

(c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and guidance established by the Office of the Inspector General and shall report whether—

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of

the recipient's failure to report. The auditor shall not be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant to such rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to—

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of subrecipients.

(k) The Legal Services Corporation shall—

(1) follow up on significant reportable conditions, findings, and recommendations found by the independent public accountants and reported to Corporation man-

agement by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the requirements of Office of Management and Budget Circular Number A-50.

(l) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

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## Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104–134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF NONCOMPETITIVE PROCEDURES.—For purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104–134 (110 Stat. 1321–51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104–134 (110 Stat. 1321–53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104–134 (110 Stat. 1321–58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (with-

out the active participation, of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Pub. L. 103–322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104–134 (110 Stat. 1321–58 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

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## Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105–119, 111 Stat. 2440

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104–134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF CERTAIN PROCEDURES.—Sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act.

(c) ADDITIONAL PROCEDURES.—If, during any term of a grant or contract awarded to a recipient by the Legal Services Corporation under the competitive selection process referred to in subsection (a) and applicable Corporation regulations,

the Corporation finds, after notice and opportunity for the recipient to be heard, that the recipient has failed to comply with any requirement of the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), this Act, or any other applicable law relating to funding for the Corporation, the Corporation may terminate the grant or contract and institute a new competitive selection process for the area served by the recipient, notwithstanding the terms of the recipient's grant or contract.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 567 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321 53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Public Law 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-

134 (110 Stat. 132158 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in accordance with the requirements referred to in subsection (a).

SEC. 504. (a) DEBARMENT.—The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS.—The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE.—In this section, the term "good cause", used with respect to debarment, includes—

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any activity prohibited by, or inconsistent with, section 504 of Public Law 104–134 (110 Stat 1321–53 et

seq.), section 502(a)(2) of Public Law 104–208 (116 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

SEC. 505. (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.

(b) Any basic field program which receives Federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:

(1) The name and full address of each party to the legal action unless such information is protected by an order or rule of a court or by State or Federal law or revealing such information would put the client of the recipient of such Federal funds at risk of physical harm.

(2) The cause of action in the case.

(3) The name and address of the court in which the case was filed and the case number assigned to the legal action.

(c) The case information disclosed in semiannual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

SEC. 506. In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual, and shall not include any jointly held assets.

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# LEGAL SERVICES CORPORATION

## 45 CFR Part 1610

## Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

**AGENCY: Legal Services Corporation.**

**ACTION: Final rule.**

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SUMMARY: This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") interim rule concerning the use of non-LSC funds by LSC recipients. The revisions are intended to address constitutional challenges while ensuring that no LSC-funded entity engages in restricted activities. This final rule continues the interim rule's deletion of the provisions on transfers of non-LSC funds and revises the interim rule's new section that sets out standards for the integrity of recipient programs. The final rule also makes several conforming revisions, including changes to definitions and section titles.

EFFECTIVE DATE: This final rule is effective June 20, 1997.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, (202) 336-8817.

SUPPLEMENTARY INFORMATION: On December 2, 1996, the Corporation published a completely revised final rule to implement Section 504 in the Corporation's FY 1996 appropriations act, Public Law 104–134, 110 Stat. 1321 (1996), as incorporated by the Corporation's FY 1997 appropriations act, Public Law 104–208, 110 Stat. 3009. Section 504 applies certain restrictions to any person or entity receiving LSC funds, effectively restricting the use of virtually all of a recipient's funds to the same degree that it restricts LSC funds. Although

not required to by law, the Corporation extended the restrictions on a recipient's funds to a transfer of a recipient's non-LSC funds. Thus, the rule required that when a recipient transferred its non-LSC funds to an entity that had no LSC funds, the conditions would remain attached to the transferred funds. However, the other funds of the entity would not be affected.

In January 1997, five legal services recipients in Hawaii, Alaska, and California, together with two of their program lawyers, two non-federal funders and a client organization, filed suit in the United States District Court for the District of Hawaii challenging a number of the Section 504 restrictions as unconstitutional conditions on their use of non-LSC funds. *Legal Aid Society of Hawaii et al.* v. *Legal Services Corporation*, Civil Action No. 97-00032 ACK, (hereinafter referred to as *LASH*). The Court entered an order on February 14, 1997, which preliminarily enjoined the Corporation from enforcing restrictions on the recipients' use of non-LSC funds for certain restrictions as to which the Court determined that the plaintiffs had a fair likelihood of demonstrating an infringement of First Amendment rights. (The Court denied the preliminary injunction request with respect to certain other restrictions, including those relating to class actions and representation of ineligible aliens.) The Court's preliminary ruling was grounded in pertinent part on its understanding of the Corporation's interrelated organization policy, but also implicated the expansive reach of the Corporation's restrictions on non-LSC funds. The effect of the preliminary order was to allow those recipients who are plaintiffs in the case to use their non-LSC funds to engage in certain prohibited activities within their recipient programs during the interim period before a trial on the merits and a final ruling by the judge.

A similar suit to *LASH* was also filed in January 1997, as a class action in the United States District Court for the Eastern District of New York, which sought, *inter alia*, to have the court declare certain restrictions unconstitutional and grant preliminary and final injunctive relief. *Velazquez et al.* v.

*Legal Services Corporation*, 97 Civ. 00182 (FB) (E.D.N.Y.). There has been no ruling or order issued to date.

Because the Court's order in *LASH* created a situation clearly at odds with Congressional intent, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") held public hearings and considered a draft interim rule on March 7, 1997. The Committee recommended and the Board agreed on March 8, 1997, on an interim rule, which was published in the Federal Register on March 14, 1997, with a request for comments.

The interim rule revised the final rule with the intent of addressing the constitutional concerns raised in *LASH* while preserving the statutory system created by Congress that forbids recipients from engaging in prohibited activities and subsidizing prohibited activities with LSC funds. Generally, the interim rule deleted provisions in § 1610.7 on the transfer of non-LSC funds and added a new § 1610.8 dealing with the integrity of recipient programs. Section 1610.8 replaced and nullified Section 1–7 of the Corporation's 1986 Audit and Accounting Guide, which set out the Corporation's policy on interrelated organizations.

The Corporation received three timely comments and several other comments thereafter, each of which was given careful consideration. Based on the comments and its own internal research and review, the Corporation has made several revisions to the interim rule. A section-by-section analysis of this final rule is provided below. The analysis includes explanations of provisions in the December 1996 final rule that remain unchanged by the interim or this final rule.

*Section 1610.1 Purpose*

The purpose section is intended to reflect Congressional intent that no LSC-funded organization engage in any restricted activities. This final rule adds language clarifying that the purpose of the rule is to ensure that recipients maintain objective integrity and independence from organizations that engage in restricted activities. The term "restricted activ-

ities" is used in the preamble and text of this rule as an umbrella term to refer to the restrictions included in the definitions of "purpose prohibited by the LSC Act" and "activity prohibited by or inconsistent with Section 504."

*Section 1610.1 Definitions*

This section provides definitions for terms used in this part. Paragraph (a) defines "purpose prohibited by the LSC Act." The December 1996 final rule revised the Corporation's longstanding definition in several ways. This rule deleted reference to a prohibition on the representation of juveniles, because the prohibition is no longer in the LSC Act. This rule also deleted reference to those restrictions on activities in the LSC Act that are now included in the broader restrictions in the Corporation's appropriations act. Numbering changes were also made to conform to 1977 amendments to the LSC Act. These changes have been retained in this rule.

Paragraph (b) defines "activity prohibited by or inconsistent with Section 504" by listing the prohibitions and requirements in Section 504 of the Corporation's FY 1996 appropriations which have been incorporated by reference in the Corporation's FY 1997 appropriations act. These prohibitions and requirements apply to a recipient's activities, regardless of the source of funding. The definition also makes reference to subsections 504(b) and 504(e), which provide exceptions for specific activities supported by non-LSC funds.

This section also includes definitions of "IOLTA funds," "non-LSC funds," "private funds," "public funds," and "tribal funds." No changes in these definitions have been made by this rule.

Changes have been made to the definition of "transfer" to help clarify the meaning of the term and to reflect the deletion of the provisions on transfers of non-LSC funds. Minor changes were made to the first sentence of the definition to clarify that a "transfer" includes payments of LSC funds by a recipient to a person or entity for programmatic activities nor-

mally conducted by the recipient, such as the representation of eligible clients. A second sentence is added to clarify what is not included in the term. The additional language provides that a "transfer" does not include payments of LSC funds to vendors, accountants or other providers of goods and services in the normal course of business. The term is now found in the section on program integrity as well as in the section on transfers of LSC funds.

*Section 1610.3 Prohibition*

This section sets out the prohibition which states that recipients may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless authorized by other provisions in this part.

*Section 1610.4 Authorized Use of Non-LSC Funds*

This section sets out the circumstances where the restrictions in Section 504 and the LSC Act do not apply to certain categories of a recipient's non-LSC funds. Generally, pursuant to § 1010(c) of the LSC Act, the restrictions in the LSC Act apply to a recipient's LSC and private funds but do not apply to a recipient's public or tribal funds if they are used for the purposes for which they are provided. Restrictions in Section 504, however, generally apply to all of a recipient's funds, including public funds. Paragraph (a) clarifies that, under the LSC Act and Section 504, tribal funds may be used for the purposes for which they were provided. Paragraph (b) clarifies that a recipient's public funds are not subject to the restrictions in the LSC Act but are subject to those in Section 504. This section also states that "IOLTA funds" are to be treated the same as public funds. Because a recipient's private funds are subject to the restrictions in both the LSC Act and Section 504, paragraph (c) clarifies that private funds may be used for the purposes for which they were provided, as long as such use is consistent with the restrictions in the LSC Act

and Section 504. Finally, paragraph (d) implements an exception in Section 504 which allows recipients to use non-LSC funds for financially ineligible clients, as long as the funds are used for the specific purpose for which they were received and are not used in a manner that violates the LSC Act or Section 504.

*Section 1610.5 Notification*

This section incorporates the requirement of Section 504(d)(1) of the appropriations act that recipients may not accept funds from non-LSC sources unless they provide written notice to the funders that their funds may not be used in any manner inconsistent with the LSC Act or Section 504. The requirement applies only to cash contributions; recipients are not required to notify persons or organizations who make non-cash donations or volunteer their time or services to the recipient.

The rule contains a *de minimis* exception which relieves recipients of the notice requirement for individual contributions of less than $250. This exception is keyed to the level which triggers the IRS reporting requirement. It is not intended to incorporate any IRS instructions and guidelines concerning contributions to charities. It simply recognizes that, because recipients must provide acknowledgments for donations of $250 or more for IRS purposes, it does not constitute any significant additional burden to incorporate the required notification into the acknowledgment.

Generally, notification should be provided before the recipient accepts the funds. Thus, notice should be given during the course of soliciting funds or applying for a grant or contract. However, for unsolicited donations where advance notice is not feasible, notice should be given in the recipient's letter acknowledging the contribution. For contracts and grants awarded prior to the enactment of the restriction, notice should be given prior to acceptance by the recipient of any additional payments.

The notice requirement applies to funds received by recipients as grants, contracts or charitable donations from funders other than the Corporation, which are intended to fund the non-profit work of the recipient. It does not include funds received from sources such as court payment to attorneys for their work under court appointments; nor does it include payments to the recipient for rent, bank interest, or sale of goods, such as manuals.

An exception is provided for tribal funds. The notice requirement would apply only when the tribal funds are in fact restricted. Thus, when a recipient receives tribal funds to which the restrictions do not apply, no notice is required to the source of the funds.

*Section 1610.6 Applicability*

This section addresses two distinct situations. First, paragraph (a) clarifies that the prohibitions on criminal proceedings, actions challenging criminal convictions, aliens or prisoner litigation do not apply to a recipient's or subrecipient's separately funded public defender programs or projects. The authority for this provision is found in Section 1010(c) of the LSC Act and is also based on the scope of certain restrictions in Section 504. The restrictions on representation of aliens and prisoners in Section 504 apply only to civil representation and thus do not prohibit criminal representation in public defender programs. Also, although the LSC Act prohibits LSC recipients from engaging in or using resources for any criminal representation, a narrow exception for separately funded public defender programs or projects is provided in Section 1010(c).

Paragraph (b) provides an exception for criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

*Section 1610.7 Transfers of LSC Funds*

This section addresses the applicability of the statutory restrictions listed in § 1610.2 (a) and (b) when a recipient transfers LSC funds to another person or entity. The statutory restrictions on a recipient's funds in the LSC Act and the Corporation's current appropriations act do not address the applicability of these provisions when a recipient transfers its LSC funds to another person or entity. However, the Corporation has historically applied such provisions to transfers of a recipient's LSC funds. See 45 CFR parts 1627 and 1632 and Program Letter dated December 11, 1995. This policy reflects the intent of the Corporation that transfers of LSC funds not become a means to circumvent statutory restrictions on those funds.

Paragraph (a) provides that the restrictions listed in § 1610.2 (a) and (b) will apply to any LSC funds transferred to another person or entity as well as to the non-LSC funds of the person or entity receiving such funds. This requirement is based on the Corporation's interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient to another person or entity. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

Paragraph (b) modifies this requirement in the areas of timekeeping and priorities. The statutory provisions on timekeeping and priorities are administrative requirements more appropriately applicable to a recipient's own use of its funds. The intent is to assure greater accountability for the recipient's use of its funds without imposing unnecessary administrative burdens. Thus, this section applies the administrative requirements on priorities and timekeeping only to the funds transferred and only to the extent to ensure accountability for those funds. The rule requires that entities receiving a transfer of LSC funds must either use the funds consistent with the recipient's priorities or establish their own priorities for the

use of the funds. In regard to timekeeping, the language tracks the statutory requirement so that entities that receive a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred. However, they are not required to keep time in accordance with the Corporation's timekeeping regulation, 45 CFR part 1635.

Paragraph (c) provides an exception for a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614. For such transfers, the restrictions or requirements would apply only to the LSC funds transferred and not to the other funds of the persons or entities listed in this paragraph.

The December 1996 final rule included provisions on the transfer of non-LSC funds. The interim rule deleted these provisions and included in the rule instead a new § 1610.8 on program integrity. The deleted provisions provided that non-LSC funds transferred by a recipient would be subject to the restrictions of this part, but that any other funds of the entity receiving such funds would not be subject to the restrictions.

Comments on the interim rule generally favored deleting the provisions, but suggested that the Corporation state affirmatively in the rule itself that non-LSC funds that are transferred are not subject to the restrictions. The Board determined that it is not necessary to include an affirmative statement of the effect of taking out the provisions. There is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions, and the fact that the provision has been deleted speaks for itself.

*Section 1610.8 Program Integrity of Recipient*

This section provides a standard for program integrity by requiring that recipients maintain objective integrity and independence from any organization that engages in restricted activities. The program integrity test in the interim rule was

a 2-step process. Paragraph (a)(2) of § 1610.8 of the interim rule set out the first step by delineating the factors used to determine whether an affiliation existed between the recipient and another organization, such that the recipient would be found to control, be controlled by or be subject to common control by the other organization. The factors to determine control were taken almost verbatim from the Corporation's interrelated organization policy. If such an affiliation were found to exist under paragraph (a), then the recipient was required to comply with step 2, the program integrity test delineated in paragraph (b), so that the restrictions listed in this part would not apply to the affiliate organization. The second step of the program integrity test was fashioned after the program integrity standard found to be constitutional in *Rust* v. *Sullivan* by the Supreme Court, see 500 U.S. 173 (1991).

Most of the comments on the interim rule's first step (the interrelated organization policy) stated that the meaning of several of the factors to determine control was unclear. In addition, although paragraph (a) expressly stated that only one factor would be dispositive of control, the commenters also expressed confusion on this matter and suggested that the determination of control should be based on the totality of the facts and not on the existence of any particular factor.

Based on the Corporation's review of the comments and its research and analysis of the factors of the interrelated organization policy, the Board decided to delete paragraph (a) in its entirety for the following reasons:

The purpose of the policy was to establish whether a relationship existed between the recipient and another organization, such that the recipient and the other organization actually operated as one, rather than two separate organizations. The Board determined that if a program is found to be in compliance with the second step of the program integrity test, there would be a sufficiently separate identity and operational independence from the recipient.

Based on comments from the Corporation's Office of Inspector General (OIG), the Board determined that the interim rule did not provide sufficient guidance regarding any relationship a recipient might have with another independent organization. Under the interim rule, a recipient could have a relationship with another organization in which no formal control of one organization by the other exists, but in which there is substantial sharing of non-LSC funds, office space, equipment and personnel. By deleting paragraph (a) and revising paragraph (b), the rule provides guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities. At the same time, because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards.

Comments on the second step generally stated that the standards created substantial practical problems for recipients. They also said that the standards were unclear as to the strictness of each factor, whether any particular factor would be determinative and whether a determination of compliance with the standards would be based on the totality of the facts.

Having deleted the first step of the analysis on program integrity, the Board revised the second step to stand alone without reference to the interrelated organization factors. In response to comments, this new paragraph (a) was further revised to clarify that a determination of compliance with the program integrity standard would require a case-by-case determination based on the totality of the facts. Paragraph (a) now provides that a recipient must have an objective integrity and independence from any organization that engages in prohibited activities. Whether a recipient will be found to have such objective integrity and independence will be based on three considerations.

First, paragraph (a)(1) provides that the other organization must be a separate legal entity. This factor was implied but not made explicit in the interim rule. This change is necessary

to implement Congressional intent that a recipient as a legal entity may not engage in certain restricted activities, regardless of the source of funds. At the same time, the Corporation has fashioned a rule that does not foreclose a recipient from engaging in restricted activities through another legally distinct organization, as long as the recipient meets this rule's program integrity standards.

Second, paragraph (a)(2) provides that the other organization must not receive any LSC funds and no LSC funds may subsidize restricted activities. In response to comments, the Board deleted the words "directly or indirectly" before "subsidize" because they elicited objections and provided unclear guidance. "Subsidize" includes a payment of LSC funds to support, in whole or in part, a restricted activity conducted by another entity, or payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use. Thus, if a recipient makes an in-kind contribution, such as donated LSC-funded space or telephone services, to another organization, the donation would be a subsidy. However, this example is not intended to mean that a recipient may share resources as long as the recipient receives a fair payment. A recipient must also maintain an actual physical and financial separation as set out in paragraph (a)(3) of this section.

Third, under paragraph (a)(3), the recipient must maintain a physical and financial separation from the other organization. Mere bookkeeping is not enough and a determination of sufficient separation will be based on the totality of the facts. The factors include, but are not limited to, existence of separate personnel, existence of separate accounting and timekeeping records, degree of separation of facilities and extent of the use of facilities for restricted work, and the extent to which indicia, such as signs, distinguish the recipient from the other organization. Whether the recipient meets the program

integrity standard by having sufficient separation will be determined on a case-by-case basis, and each case will be determined on the totality of the facts and no one factor is intended to be determinative.[1]

Several commenters asked the Corporation to clarify whether the "program integrity" requirement would automatically fail to be satisfied if a particular factor, such as personnel or facilities, was not completely separate. Because the Corporation is adopting a case-by-case approach based on the totality of the circumstances, LSC does not believe that it would be appropriate or feasible to use this preamble to provide advisory opinions based on limited or incomplete information about a recipient's relationship with an organization involved in restricted activities. However, consistent with the Corporation's longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant "program integrity" information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities.

Commenters on the practical problems raised by the standards argued for mere bookkeeping and appeared to say that use of LSC-funded facilities and equipment is necessary for a non-LSC organization to function and engage in prohibited activities. Some commenters stated that it is not financially possible to duplicate everything and that programs should be allowed to use a recipient's facilities, equipment or staff, as long as there is appropriate documentation and allocation of funds. The Board determined that such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities. The rule requires "objective integrity and independence" which cannot be achieved by

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[1] In response to certain comments construing or characterizing the separation-of-personnel factor as dispositive or absolute, the interpretation in this preamble, based on consideration of the totality of the circumstances, supersedes any arguably contrary or inconsistent interpretation provided by any individual LSC official prior to issuance of this final rule.

mere bookkeeping. Thus, determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

The interim rule's requirement that the recipient's board approve the recipient's affiliation with another organization has been deleted and replaced by a requirement in paragraph (b) that each recipient's governing body certify to the Corporation within 180 days of the effective date of this rule that it is in compliance with the program integrity standards set out in this section. Thereafter, the governing body must certify on an annual basis that the recipient has maintained such compliance. This requirement is intended to ensure that a recipient's governing body has reviewed any relationships the recipient has with other organizations involved in restricted activities to assure compliance with the program integrity standards. The Corporation will issue guidance regarding the form of certification and the records necessary to support such certification.

*Section 1610.9 Accounting*

This section sets out the general accounting requirement for recipients for their non-LSC funds. Currently, recipients are directed by the accounting guidance issued by the Corporation.

List of Subjects in 45 CFR Part 1610

Grant programs, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR Part 1610 to read as follows:

# PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

Sec.

1610.1 Purpose.
1610.2 Definitions.
1610.3 Prohibition.
1610.4 Authorized use of non-LSC funds.
1610.5 Notification.
1610.6 Applicability.
1610.7 Transfers of LSC funds.
1610.8 Program integrity of recipient.
1610.9 Accounting.

Authority: 42 U.S.C. 2996i; Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

## § 1610.1 Purpose.

This part is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients and to ensure that no LSC-funded entity shall engage in any restricted activities and that recipients maintain objective integrity and independence from organizations that engage in restricted activities.

## § 1610.2 Definitions.

(a) *Purpose prohibited by the LSC Act* means any activity prohibited by the following sections of the LSC Act and those provisions of the Corporation's regulations that implement such sections of the Act:

(1) Sections 1006(d)(3), 1006(d)(4), 1007(a)(6), and 1007(b)(4) of the LSC Act and 45 CFR part 1608 of the LSC Regulations (Political activities);

(2) Section 1007(a)(10) of the LSC Act (Activities inconsistent with professional responsibilities);

(3) Section 1007(b)(1) of the LSC Act and 45 CFR part 1609 of the LSC regulations (Fee-generating cases);

(4) Section 1007(b)(2) of the LSC Act and 45 CFR part 1613 of the LSC Regulations (Criminal proceedings);

(5) Section 1007(b)(3) of the LSC Act and 45 CFR part 1615 of the LSC Regulations (Actions challenging criminal convictions);

(6) Section 1007(b)(7) of the LSC Act and 45 CFR part 1612 of the LSC Regulations (Organizing activities);

(7) Section 1007(b)(8) of the LSC Act (Abortions);

(8) Section 1007(b)(9) of the LSC Act (School desegregation); and

(9) Section 1007(b)(10) of the LSC Act (Violations of Military Selective Service Act or military desertion).

(b) *Activity prohibited by or inconsistent with Section 504* means any activity prohibited by, or inconsistent with the requirements of, the following sections of 110 Stat. 1321 (1996) and those provisions of the Corporation's regulations that implement those sections:

(1) Section 504(a)(1) and 45 CFR part 1632 of the LSC Regulations (Redistricting);

(2) Sections 504(a)(2) through (6), as modified by Sections 504(b) and (e), and 45 CFR part 1612 of the LSC Regulations (Legislative and administrative advocacy);

(3) Section 504(a)(7) and 45 CFR part 1617 of the LSC Regulations (Class actions);

(4) Section 504(a)(8) and 45 CFR part 1636 of the LSC Regulations (Client identification and statement of facts);

(5) Section 504(a)(9) and 45 CFR part 1620 of the LSC Regulations (Priorities);

(6) Section 504(a)(10) and 45 CFR part 1635 of the LSC Regulations (Timekeeping);

(7) Section 504(a)(11) and 45 CFR part 1626 of the LSC Regulations (Aliens);

(8) Section 504(a)(12) and 45 CFR part 1612 of the LSC Regulations (Public policy training);

(9) Section 504(a)(13) and 45 CFR part 1642 of the LSC Regulations (Attorneys' fees);

(10) Section 504(a)(14) (Abortion litigation);

(11) Section 504(a)(15) and 45 CFR part 1637 of the LSC Regulations (Prisoner litigation);

(12) Section 504(a)(16), as modified by Section 504(e), and 45 CFR part 1639 of the LSC Regulations (Welfare reform);

(13) Section 504(a)(17) and 45 CFR part 1633 of the LSC Regulations (Drug-related evictions); and

(14) Section 504(a)(18) and 45 CFR part 1638 of the LSC Regulations (In-person solicitation).

(c) *IOLTA funds* means funds derived from programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(d) *Non-LSC funds* means funds derived from a source other than the Corporation.

(e) *Private funds* means funds derived from an individual or entity other than a governmental source or LSC.

(f) *Public funds* means non-LSC funds derived from a Federal, State, or local government or instrumentality of a government. For purposes of this part, IOLTA funds shall be treated in the same manner as public funds.

(g) *Transfer* means a payment of LSC funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities.

*Transfer* does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

(h) *Tribal funds* means funds received from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

§ 1610.3 Prohibition.

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§ 1610.4, 1610.6 or 1610.7 of this part.

§ 1610.4 Authorized use of non-LSC funds.

(a) A recipient may receive tribal funds and expend them in accordance with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with Section 504.

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with Section 504.

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

§ 1610.5 Notification.

(a) Except as provided in paragraph (b) of this section, no recipient may accept funds from any source other than the Corporation, unless the recipient provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds.

(b) A recipient is not required to provide such notification for receipt of contributions of less than $250.

§ 1610.6 Applicability.

Notwithstanding § 1610.7(a), the prohibitions referred to in §§ 1610.2(a)(4) (Criminal proceedings), (a)(5) (Actions challenging criminal convictions), (b)(7) (Aliens) or (b)(11) (Prisoner litigation) of this part will not apply to:

(a) A recipient's or subrecipient's separately funded public defender program or project; or

(b) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

§ 1610.7 Transfers of LSC funds.

(a) If a recipient transfers LSC funds to another person or entity, the prohibitions and requirements referred to in this part, except as modified by paragraphs (b) and (c) of this section, will apply both to the LSC funds transferred and to the non-LSC funds of the person or entity to whom those funds are transferred.

(b)(1) In regard to the requirement in § 1610.2(b)(5) on priorities, persons or entities receiving a transfer of LSC funds shall either:

(i) Use the funds transferred consistent with the recipient's priorities; or

(ii) Establish their own priorities for the use of the funds transferred consistent with 45 CFR part 1620;

(2) In regard to the requirement in § 1610.2(b)(6) on timekeeping, persons or entities receiving a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred.

(c) For a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, the prohibitions or requirements of this part shall apply only to the funds transferred.

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

§ 1610.9 Accounting.

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation.

Dated: May 19, 1997.

Victor M. Fortuno,
*General Counsel.*

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 99-603

IN THE

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner,*

*v.*

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether the Second Circuit was correct in invalidating a congressional appropriations rider that authorizes legal services attorneys to represent indigent persons in cases seeking the award of welfare benefits, but bars those attorneys from calling to courts' attention possible constitutional or statutory defects in welfare benefits laws? Specifically:

1. Whether the ruling of the Second Circuit was correct on the ground that the Legal Services Corporation regulations — which permit, in very limited circumstances, a Legal Services Corporation grantee to create an affiliated organization to undertake activities otherwise prohibited by the federal restrictions — are invalid because they conflict irreconcilably with the statute which absolutely bars non-federally funded legal services lawyers from challenging the legality of welfare laws, in violation of settled First Amendment case law?

2. Whether the ruling of the Second Circuit was correct on the statutory ground that, properly construed, the interaction between the 1996 Appropriations Rider and the text of the Legal Services Corporation Act does not require legal services attorneys to refrain from contesting the constitutionality or legality of welfare laws in settings where such a betrayal of a client's interests would be ethically intolerable?

3. Whether the ruling of the Second Circuit was correct on the ground that the prohibition against legal services lawyers challenging the constitutionality of welfare-related statutes constitutes government viewpoint discrimination in violation of the First Amendment?

4. Whether the ruling of the Second Circuit was correct on the ground that, by permitting legal services lawyers to litigate welfare benefits cases but barring them from calling to courts' attention possible constitutional or statutory defects in welfare benefits laws, the challenged restriction attempts to skew the courts' decisional processes in favor of the federal government, in violation of the separation of powers mandated by the Constitution?

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## OPINIONS BELOW

The opinion of the court of appeals (United States Pet. at 1a-41a) is reported at 164 F.3d 757. The memorandum and order of the district court (United States Pet. at 42a-84a) are reported at 985 F. Supp. 323.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999. Petitions for rehearing timely filed by the Legal Services Corporation (LSC) and Carmen Velazquez, et al., were denied on July 8, 1999. On October 6, 1999, Carmen Velazquez, et al., and LSC, filed with this Court timely petitions for certiorari seeking review of aspects of the court of appeals' decision. On December 6, 1999, the United States — which had joined the litigation as defendant-intervenor in the court below because the constitutionality of a federal statute was at issue — filed a petition for a writ of certiorari supporting the position of LSC.

Carmen Velazquez, et al., filed a brief in opposition to the United States' petition on January 5, 2000. Then, on February 1, 2000, this Court issued an order directing Carmen Velazquez, et al., to file a response to the petition of LSC. This brief is filed pursuant to the February 1 order and this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

In 1974, Congress established LSC, a quasi-independent federally chartered corporation vested with responsibility for disbursing federal funds for the purpose of providing legal representation for the poor in civil cases. Aware that federally

funded lawyers for the poor would often be obliged to challenge actions or policies of one or another layer of government on behalf of their indigent clients, Congress self-consciously tailored the Legal Services program to minimize the risk of government interference with the exercise of independent, zealously loyal legal representation. Congress rejected the model of a centrally controlled federal legal aid bureaucracy, opting instead to channel federal subsidies to a broad array of private, locally governed independent entities committed to providing vigorous legal representation to the poor.

Moreover, as the United States accurately noted in its petition for a writ of certiorari, Congress from the beginning required LSC-funded lawyers to conform to the highest ethical standards of the profession. (United States Pet. at 6.) For the past quarter-century, the LSC Act has provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6). The Act also provides that LSC

> shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

42 U.S.C. § 2996e(b)(3).

From 1974 to 1996, Congress ensured that government-imposed practice restrictions on LSC-funded lawyers did not collide with the statutorily mandated duty of zealous representation by explicitly providing for an ethical override in connection with certain practice restrictions,[1] and by permitting supplemental state funds and private donations to be used to provide a full spectrum of legal representation when necessary.

In 1996, however, Congress enacted the appropriations riders at issue in this case, significantly increasing the scope of practice restrictions imposed on LSC-funded lawyers and, for the first time, extending the practice limitations to non-federally funded representation. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-55 (1996 Appropriations Rider). Under the literal wording of the 1996 Appropriations Rider, LSC-funded lawyers appeared to be absolutely barred from engaging in a wide range of lawyering tasks, even when the tasks were carried out with non-federal funds. *See* 1996 Appropriations Rider, § 504(d)-(e). Under litigation pressure, LSC issued interpretive regulations purporting to construe the apparently absolute bans as authorizing Legal Services programs to provide otherwise forbidden forms of legal representation using non-federal funds so long as the non-federally funded legal program is sufficiently separate from the legal program receiving federal aid. *See* 45 C.F.R. § 1610.

The petitions of the LSC and the United States in this case do not discuss the onerous restrictions imposed by the

1. For example, the statutory ban on using LSC funds to influence agency or legislative action is subject to an explicit ethical override when necessary to represent an eligible client. *See* 42 U.S.C. § 2996f(a)(5).

1996 Appropriations Rider on lawyering services provided by LSC aid recipients using non-federal funds. Rather, they seek review of a decision by a majority of the panel of the Second Circuit, written by Judge Pierre Leval, holding that Congress may not forbid LSC-funded lawyers — who are explicitly authorized to represent indigent clients seeking welfare benefits — from challenging the constitutionality or legality of statutes or regulations that prevent such clients from receiving benefits.[2] This restriction is particularly damaging in this era of welfare reform and devolution, for states are experimenting with a wide range of welfare responses — some of them far more punitive and arbitrary than Congress could have contemplated — and this provision purports to bar lawyers for the poor whose offices receive federal money from questioning whether state implementing regulations transgress statutory or constitutional standards.

Judge Leval reasoned that although government has broad discretion in deciding what programs to fund, it may not exercise its funding power to permit only one viewpoint to be expressed, especially in the context of an adversary legal proceeding where the integrity of the judicial process depends upon the ability to present all available legal arguments to the court. In effect, noted Judge Leval, the restriction on challenging the constitutionality or legality of a welfare statute allows a federally funded Legal Services lawyer to support the legal status quo, but forbids the lawyer

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2. The related petition for certiorari filed by Carmen Velazquez, et al., challenges, among other things, the constitutionality of requiring local LSC-funded programs to establish immensely wasteful and inefficient "physically separate" legal programs in order to use private funds to provide indigent clients with a full spectrum of legal representation. *See Velazquez v. Legal Servs. Corp.*, No. 99-604.

from arguing that the government-imposed status quo is unlawful or unconstitutional. Judge Leval held that such a restriction on the ability of a federally funded lawyer to advance a client's legal interests in court violates the First Amendment ban on government-imposed viewpoint discrimination. (United States App. 32a-35a.)

Judge Jacobs dissented, arguing that the power of government to decide what programs to fund necessarily includes the power to define the federally funded Legal Services program to include representation of indigent clients seeking welfare benefits under existing law but to exclude challenges to existing law as outside of the scope of the defined program — even when the existing law is alleged to violate federal constitutional or statutory requirements. (United States App. 46a-48a.) Judge Jacobs' reasoning, adopted in large part by LSC and the United States in their petitions, reduces First Amendment restrictions on government funding to a tautology, permitting government to respond semantically to virtually any First Amendment challenge to funding restrictions by characterizing the restrictions as the defining parameters of the government's program.

## REASONS FOR DENYING THE WRIT

## I.

## THE QUESTION URGED BY PETITIONERS IS NOT APPROPRIATE FOR CERTIORARI REVIEW

### A. The Principle of Constitutional Avoidance Counsels Against this Court Reviewing the First Amendment Viewpoint Discrimination Issue Raised by Petitioners in Light of the Unambiguous Alternative Grounds Supporting the Ruling Below

LSC and the United States in their petitions both seek review of the Second Circuit's ruling that invalidated on First Amendment viewpoint discrimination grounds the 1996 Appropriations Rider's bar against questioning the legality of welfare laws in the course of cases challenging wrongful denials of benefits. However, that viewpoint discrimination ruling — while doctrinally correct — is not an appropriate subject for certiorari review since it presents certain novel questions of First Amendment doctrine and there exist at least two unambiguous alternative grounds supporting the same outcome — *i.e.*, that the restriction in question is invalid and unenforceable. In view of this Court's principle of constitutional avoidance, *see, e.g., Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979) ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."), the question urged by LSC and the United States is not appropriate for review by this Court.

### 1. The Ruling Below is Correct on the Alternative Ground That the LSC Implementing Regulations Are Invalid and, Stripped of the Regulations, the 1996 Appropriations Rider Is Plainly Unconstitutional Under *FCC v. League of Women Voters*

The first of these two unambiguous alternative grounds supporting the result below follows from the fact that the "interpretive" regulations issued by LSC in the course of the district court litigation are invalid because they conflict squarely with the statute that they purport to implement. The 1996 Appropriations Rider's plain language unequivocally bans recipients of LSC funds from using non-federal funds to engage in the categories of activities prohibited under the appropriations rider. Nowhere in the congressional text or legislative history is there any hint that Congress wished to authorize LSC fund recipients to establish parallel programs to use non-federal funds to engage in prohibited activities. To the contrary, the section-by-section analysis of the Senate bill that became the 1996 Appropriations Rider expressly states: "The legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392, at 26 (1996).[3]

3. *Rust v. Sullivan* teaches that when Congress wishes to authorize use of separate programs to ensure that federal funds are not used for prohibited activities, Congress knows how to do so. 500 U.S. 173 (1991). In the Title X family planning program at issue in that case, Congress explicitly distinguished between the specific "projects" funded by Title X and the "grantees," which undertook the "projects." The restrictions challenged in *Rust* applied only to the "projects." *See* 500 U.S. at 196. There is no attempt to make such a distinction in the 1996 Appropriations Rider, which is explicitly aimed at LSC fund "recipients." *See* 1996 Appropriations Rider, § 504. Thus, LSC is in the legally untenable position of attempting to replicate the *Rust* regulations, but without the *Rust* statutory authorization.

But in *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984), this Court squarely held that the First Amendment does not tolerate such absolute bars on the use of private funds to pursue constitutionally protected advocacy. LSC's regulations attempt to remedy this obvious and deliberate constitutional offense by rewriting the statute so as to permit private funds to be expended for restricted activities — albeit, only through an unacceptably burdensome and wasteful "physically separate" program. But under *Chevron USA Inc. v. Natural Resources Defense Council*, courts "must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. 837, 843 n.9 (1984). Neither agencies nor courts are "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties," *Lowe v. Securities & Exch. Comm'n*, 472 U.S. 181, 213 (1985) (White, J., concurring), and so LSC's regulation is invalid because it "materially deviates from the legislative plan," *id.*, that it purports to implement. Additionally, as LSC is an independent corporation and outside of the executive branch, its regulations are not due the same degree of deference as those of an executive agency. *See Chevron*, 467 U.S. at 866 (deference to administrative interpretation derives from "Constitution['s] vest[ing of] . . . responsibilities [for assessing the wisdom of policy choices] in the political branches"). Stripped of these unauthorized regulations, what remains is the 1996 Appropriations Rider's patently unconstitutional absolute prohibition on expenditure of even private funds for restricted purposes. The obvious unconstitutionality of this provision under *League of Women Voters*, 468 U.S. at 400, is an alternative and legally unambiguous ground supporting the result below — and thus a reason why the novel First Amendment question urged by LSC and the United States is inappropriate for review by this Court.

### 2. The Ruling Below is Correct on the Alternative Statutory Ground That, Properly Construed, the 1996 Appropriations Rider and the LSC Act Do Not Always Bar LSC-Funded Attorneys from Challenging the Constitutionality or Legality of Welfare Laws

Moreover, certiorari review of the Second Circuit's viewpoint discrimination ruling is that much more unnecessary because the result below is correct on yet another alternative ground: that, properly construed, the interaction between the 1996 Appropriations Rider and the text of the LSC Act does not require LSC-funded attorneys to refrain from contesting the constitutionality or legality of welfare laws in settings where such a betrayal of a client's interests would be ethically intolerable.

As the United States correctly notes in its petition (United States Pet. at 6 n.2), the LSC Act requires LSC-funded attorneys to adhere to the highest ethical standards. *See* LSC Act, 42 U.S.C. § 2996(6) ("[A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."); § 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . [LSC] shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities."); § 2996f(a)(1) (LSC must "insure the maintenance of the highest quality of service and professional standards, the

preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients."). An appropriations rider that explicitly permits an LSC-funded lawyer to undertake the representation of an indigent client but forbids the lawyer from advancing crucial legal arguments on behalf of that client is in clear tension with the text of the LSC Act that mandates compliance with ethical norms. It is possible, of course, to resolve the tension by reading the 1996 Appropriations Rider — which says nothing about ethical obligations — as impliedly repealing those provisions of the LSC Act that mandate compliance with the Canons of Ethics and the Code of Professional Responsibility. But such a misreading would violate this Court's well established rule that an appropriations rider should not be construed to repeal substantive statutory provisions by implication. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *see also* House Rule XXI(a)(i); Standing Rules of the Senate, Rule 16.2 (forbidding substantive amendments through appropriations riders).

Rather, the practice restrictions imposed by the 1996 Appropriations Rider should be read in conjunction with the overriding command in the statutory text that LSC-funded lawyers act in accordance with ethical obligations. Thus, in those settings where compliance with welfare practice restrictions described in the 1996 Appropriations Rider would result in a violation of the Canons of Ethics (for example, because adequate alternative counsel for an indigent client is unavailable), respect for the text of the LSC Act requires that LSC-funded lawyers be permitted to act in accordance with the ethical precepts of the American legal

profession without jeopardizing the funding of their legal programs.[4]

As with the patent unconstitutionality of the 1996 Appropriations Rider's purported restrictions on the use of non-federal funds, this construction of the statute offers an independently adequate alternative ground that should make Supreme Court review unnecessary. For, even if the 1996 Appropriations Rider were upheld, LSC-funded lawyers should be able to challenge welfare laws and regulations in instances where their ethical obligations make such advocacy essential. In view of these multiple bases for the ruling below, prudential concerns counsel strongly against this Court's deciding the difficult First Amendment viewpoint discrimination question urged by petitioners.

### B. The Ruling Below Does Not Conflict with the Decision of the Ninth Circuit in *Legal Aid Society of Hawaii v. Legal Services Corporation*

Petitioners' suggestion that Judge Leval's decision below is in conflict with the decision of the Ninth Circuit in *Legal Aid Society of Hawaii v. Legal Services Corporation*,

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4. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). The ABA ethics opinion suggests that an LSC lawyer should, first, seek to comply with practice restrictions imposed by the 1996 Appropriations Rider by obtaining adequate alternative counsel. When adequate alternative counsel is unavailable, the opinion acknowledges that, in the absence of an ethical override, a LSC-funded lawyer would be placed in the untenable position of balancing the needs of a present client against the needs of future clients who would be harmed by a cut-off of funds. The ethics opinion makes clear that a client may never be asked to consent in advance to future representation that may prove inadequate.

145 F.3d 1017 (9th Cir), *cert. denied*, 119 S. Ct. 539 (1998), is unpersuasive. The plaintiffs in that case attacked the 1996 Appropriations Rider only insofar as it limited the use of non-federal funds by Legal Services grantees; they disclaimed any challenge to restrictions imposed upon LSC-funded attorneys who are paid out of federal funds. The instant suit raises this unaddressed issue. Accordingly, the Ninth Circuit did not squarely address the central issue raised by the petitions for certiorari of LSC and the United States: the constitutionality of substantive limits placed on the ability of federally funded lawyers to advance crucial legal arguments on behalf of a client.

## II.

## THE QUESTION URGED BY PETITIONERS WAS CORRECTLY DECIDED BELOW

### A. The Prohibition Against Challenging Welfare Laws Constitutes Impermissible Government Viewpoint Discrimination in Violation of the First Amendment

The question urged by petitioners is inappropriate for certiorari review, not just because there exist alternative grounds supporting the same result and there is no actual circuit split on the issue, but also because the Second Circuit's decision invalidating the 1996 Appropriations Rider's prohibition against challenging welfare laws was correct. This one-sided restriction aimed at insulating state and federal welfare rules from judicial review by preventing LSC-funded lawyers from calling possible legal defects to courts' attention blatantly transgresses the First Amendment's prohibition against government viewpoint discrimination.

The petitions for certiorari filed by LSC and the United States both seriously misread the governing precedents of *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and fail to recognize the crucial fact that while they operate with federal subsidies, LSC-funded lawyers do not speak for the government when representing low income clients. Both LSC and the United States read *Rust v. Sullivan* so broadly as to reduce First Amendment challenges to restrictions imposed by government funding statutes to a tautological process trivializing the First Amendment. At the same time, LSC and the United States read the more recent decision of the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), which unanimously struck down a government effort to use the funding power to suppress a disfavored viewpoint, so narrowly that the decision is drained of virtually all precedential value.

In *Rust*, this Court upheld a restriction on the discussion of abortion by doctors employed in a government-funded family planning clinic. The *Rust* majority reasoned that, in the context of the family planning clinic program, the clinic doctor was really a spokesperson for the government and could, therefore, be confined to disseminating the government's desired message. 500 U.S. at 192-94. Moreover, reasoned the *Rust* majority, the extremely narrow form of medical service provided by a family planning clinic doctor prevented the emergence of a "traditional" doctor-patient relationship that might well have been entitled to a greater degree of First Amendment protection. *See id.* at 200. Since the doctor in *Rust* was treated as a mouthpiece for the government, and since the doctor's interaction with patients was narrowly confined to a sliver of the "traditional" doctor-

patient relationship, the *Rust* majority held that limiting the doctor's speech about abortion did not violate the First Amendment. *See id.*[5]

This case is controlled not by *Rust* but by the Court's more recent decision in *Rosenberger*. In *Rosenberger*, the University of Virginia subsidized a broad array of secular student publications, but declined to provide similar subsidies to those that were religiously oriented. 515 U.S. at 824-25. Virginia sought to defend its decision to subsidize secular but not religious speech by arguing that its subsidy "program" was self-consciously confined to speech about secular subjects, just as *Rust*'s was confined to speech about family planning. *See id.* at 830-31. This Court rejected Virginia's effort in *Rosenberger* to engage in such a definitional dodge, holding that First Amendment limits on government funding restrictions cannot be reduced to a semantic tautology, especially in settings where the government is not the true speaker, but is subsidizing the speech-related activities of a broad array of private speakers. *See id.* at 834-35.

In this case, LSC and the United States merely recycle Virginia's discredited arguments. The United States proceeds

5. Justice Souter cast the crucial fifth vote supporting the 5-4 majority opinion in *Rust*. In his dissent in *National Endowment for the Arts v. Finley*, Justice Souter later stressed that "outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not 'discriminate inviduously in its subsidies in such a way as to aim at the suppression of . . . ideas." 118 S. Ct. 2168, 2185 (1998) (*quoting Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1997)). Similar to its support for the arts channeled through the National Endowment for the Arts, the government neither speaks nor buys anything for itself through the funding it provides through LSC. *Cf. Finley*, 118 S. Ct. at 2190.

as though the government were the true "speaker" in this case, using LSC-funded lawyers as spokespersons to convey a pre-selected government message the way doctors were used in *Rust*. But, as in *Rosenberger*, here Congress has elected to subsidize the speech-related activities of numerous private persons in order to enable poor litigants to oppose the government effectively in court. Unlike the doctors in *Rust*, lawyers who are subsidized in order to permit them to assist indigent clients in challenging the government in court cannot plausibly be characterized as government mouthpieces parroting the government's line.

Indeed, this Court has elsewhere taken pains to clarify that while state-funded doctors may be regarded as simply agents implementing a government program, state-funded lawyers who must frequently challenge the government in court cannot be viewed as speaking for the government. In *Polk County v. Dodson*, the Court held that criminal defendants may not bring suit under 42 U.S.C. § 1983 against government-subsidized public defenders because public defenders do not act under color of state law. 454 U.S. 312, 321 (1981). Publicly funded doctors may be liable under § 1983, the Court reasoned, because "state-employed doctors . . . face[] their employer in a very different posture than does a public defender." *Id.* at 320. In certain circumstances, "physicians assume an obligation to the mission that the State . . . attempts to achieve," *id.*, while public defenders are adversaries of the government who "work[] under canons of professional responsibility that mandate [their] exercise of independent judgment on behalf of the client." *Id.* at 321.

As in *Dodson*, the rules of professional responsibility require LSC-funded attorneys to use every tool and argument at their disposal to represent vigorously their clients who

sue the government for wrongful denial of welfare benefits. In fact, as discussed above, the LSC Act obliges LSC-funded attorneys to honor their ethical responsibilities to their clients, and specifically mandates that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6). Thus, unlike the doctors discussed in *Rust*, 500 U.S. at 193-94, and *Dodson*, 454 U.S. at 319-20, LSC-funded lawyers cannot be treated as conveying a government message because their ethical obligations flatly prohibit such divided loyalty.

LSC and the United States also proceed as though it is legitimate to subsidize pro-government speech, while withholding support from anti-government speech. One hopes that if Congress defined the LSC-funded program to encompass aid to indigent Democrats — but not indigent Republicans — LSC and the United States would recognize that the First Amendment limits the power of the government to "define" its subsidy program. The decision to subsidize lawyers' speech where they defend the legal status quo, but to forbid speech that might question its constitutionality, is scarcely less offensive than the patently unlawful discrimination between Republicans and Democrats. In both settings, government is using its funding power to advance a favored political viewpoint and to retard a disfavored one.

Nor does the suggestion that courts are not public fora provide a basis for distinguishing *Rosenberger*.[6] The cases

---

6. This argument was raised by the United States in its petition (United States Pet. at 19-20), but is not advanced by LSC.

cited earlier by the United States in support of this proposition demonstrate that the government has failed to appreciate the crucial difference between permissible regulation of courtroom behavior and impermissible and unconstitutional restrictions upon the free flow of argument and information to the court. *Kelly v. Municipal Court*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996), and *Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring), cited by the United States in its brief, stand for nothing more remarkable than the proposition that a judge enjoys broad discretion to regulate in-court speech and conduct so that judicial business may be conducted efficiently and fairly. The ability to present legal argument to the court, implicated by the restrictions in the 1996 Appropriations Rider, is not subject to such broad regulation. The integrity of the judicial process depends on the flow of information and argument to the court remaining free from government restrictions designed to favor one side in the adversary process. A court need not be characterized as a classic public forum in order to recognize that government efforts to manipulate the permissible content of counsel's argument on the basis of viewpoint are utterly corrosive of a fair adversary process.[7]

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7. Indeed, the First Amendment prohibits viewpoint discrimination even in locations or under government programs (including courtrooms) that have been deemed wholly nonpublic fora. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (even in nonpublic fora, restrictions on speech cannot constitute "an effort to suppress expression merely because public officials oppose the speaker's view") (O'Connor, J., concurring) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); *Berner v. Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997) (even in a case involving the courtroom, the state

(Cont'd)

## B. The Prohibition Against Challenging Welfare Laws Violates Separation of Powers

Moreover, the Second Circuit's ruling invalidating the welfare challenge provision is correct on the additional ground that, in attempting to impose this restriction on arguments that may be brought to the attention of courts, Congress has violated the constitutional principle of separation of powers. The Constitution's separation of powers imposes two separate but related limits on Congress' power to control the judicial branch in the performance of its fundamental duty to adjudicate cases. First, while Congress may alter in various ways the basic jurisdiction of federal courts, when Congress does confer jurisdiction it may not interfere with the courts' fundamental duty to interpret the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2172 (1997) (Congress may not overrule federal court's interpretation of Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Second, Congress may not mandate a "rule of decision" designed to dictate the specific outcome of cases pending before federal courts. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

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(Cont'd)

may not "[p]ick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook" or to "curb[] speech of which [officials] disapprove"); *East Timor Action Network, Inc. v. City of New York*, No. 99 Civ. 3664, 1999 WL 1000949 (S.D.N.Y. Nov. 4, 1999) (holding unconstitutional government's viewpoint-based exclusion of particular political faction from city program to erect temporary street signs recognizing particular persons or causes).

The congressional restriction barring LSC-funded lawyers from challenging welfare laws transgresses these two bedrock principles. By authorizing federally funded Legal Services attorneys to represent clients seeking relief from welfare agencies but barring them from calling to courts' attention the possible unconstitutionality of state or federal welfare regulations or statutes, Congress interferes with the duty of federal courts to resolve constitutional questions presented in such welfare cases — cases over which Congress has granted the courts subject matter jurisdiction under the federal question statute, 28 U.S.C. § 1331. The restriction effectively prevents federal courts from adjudicating these constitutional issues, because clients who are unable to find replacement counsel will either have to proceed with a federally funded lawyer who is barred from raising these arguments or must resort to proceeding pro se — an avenue that offers little hope as a means for securing a thorough airing and adjudication of complex constitutional questions.

Second, the restriction similarly violates the Constitution's separation of powers because it is intended to establish a "rule of decision" enabling Congress to preclude constitutional arguments that could otherwise lead to the invalidation of welfare laws. Indeed, the 1996 Appropriations Rider's legislative history amply demonstrates that this was Congress' desired result. *See, e.g.*, 142 Cong. Rec. H8149-04, 8179 (daily ed. July 23, 1996) (Rep. Burton stating: "The LSC is fighting the welfare reform plan in Wisconsin . . . even though this Congress and the President of the United States . . . support it. Why are taxpayers' dollars being used to fight the very things we think are important?").

At issue in *Klein* was Congress' attempt to affect the outcome of pending litigation by directing federal courts to give a specified congressionally defined evidentiary weight to a presidential pardon. Invalidating the statute, this Court instructed that Congress may not govern the method of deciding a case before federal courts as a means of influencing the outcome of cases. 80 U.S. (13 Wall.) at 146-47; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). By barring LSC-funded challenges to welfare laws, Congress now similarly attempts to achieve a desired litigation result by manipulating the applicable ground rules — here, by forcing the withdrawal of counsel whenever a constitutional question might be raised regarding a welfare law. The damage to federal courts' structural integrity is at least as grave as that in *Klein*. And in both cases, Congress violates the Constitution's separation of powers.

## III.

## IF THIS COURT IS INCLINED TO GRANT REVIEW, IT SHOULD GRANT ALL OF THE PETITIONS IN ORDER TO HAVE BEFORE IT THE COMPLETE 1996 APPROPRIATIONS RIDER AT ISSUE IN THIS CASE

There is thus no need for Supreme Court review of the portion of Judge Leval's opinion that carefully and correctly interprets this Court's precedents and recognizes that government may not use the funding power to impose viewpoint based restrictions on the free flow of argument needed to ensure the integrity of the judicial process. But if this case is worthy of certiorari review, it can only be because it raises the issue of the sorts of restrictions that the government may attach to public subsidies in the unusual and sensitive context of government funding for lawyers

representing indigent persons in matters adverse to the government. However, granting review of just one piece of the complex web of restrictions imposed under the 1996 Appropriations Rider would make it difficult for the Court to appreciate the peculiar harms that they cause in combination. Only by examining the full range of conditions and restrictions that Congress imposed — subject matter limitations, restrictions on using certain generally available procedural tools of lawyering, and bars against calling certain issues and arguments to courts' attention — can this Court fully assess their impact and understand the context in which the legal issues arise. Respondents therefore urge that, in the event that this Court is inclined to grant review, it should grant review of all of the petitions filed in this matter — *Legal Servs. Corp. v. Velazquez*, No. 99-603, *Velazquez v. Legal Servs. Corp.*, No. 99-604, and *United States v. Velazquez*, No. 99-960 — in order to have before it the complete set of restrictions at issue in this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 99-603

Supreme Court, U.S.
FILED
MAR 14 2000
CLERK

IN THE

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner*,

UNITED STATES OF AMERICA,

*Intervenor*,

—v.—

CARMEN VELAZQUEZ; WEP WORKERS TOGETHER!; COMMUNITY SERVICE SOCIETY OF NEW YORK, INC.; NEW YORK CITY COALITION TO END LEAD POISONING; CENTRO INDEPENDIENTE

*(Caption continued on inside front cover)*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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1000

DE TRABAJADORES AGRICOLAS, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208; FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208; PEGGY EARISMAN; OLIVE KAREN STAMM; JEANETTE ZELHOF; ELISABETH BENJAMIN; JILL ANN BOSKEY; LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and; ANDREW J. CONNICK; C. VIRGINIA FIELDS, Manhattan Borough President; GUILLERMO LINARES, Councilmember; STANLEY MICHELS, Councilmember; ADAM CLAYTON POWELL, JR. IV, Councilmember; LAWRENCE SEABROOK, Senator; SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

*Respondents.*

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## ARGUMENT

Legal Services Corporation ("LSC") respectfully submits this Reply Brief in further support of its petition for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Second Circuit that invalidated a single provision of the LSC enabling statute, as amended in 1996. That provision (the "suit-for-benefits limitation") prohibits LSC-funded lawyers from participating in litigation, lobbying or rulemaking "involving an effort to reform a Federal or State welfare system."

As LSC previously explained in detail in its Petition, the court of appeals' invalidation of the suit-for-benefits limitation conflicts with this Court's ruling in *Rust v. Sullivan*, 500 U.S. 173 (1991). As LSC also previously explained, and as Justice White, writing for a unanimous panel in *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) ("*LASH III*") concluded, the case of *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) is utterly irrelevant to the determination of this issue. *See* Petition at 13-20. LSC will therefore not repeat those arguments here. Rather, pursuant to Rule 15.6 of the Rules of this Court, LSC will only address in this brief "new points raised in the brief in opposition" that was filed by Respondents on March 1, 2000. As LSC demonstrates below, the arguments raised by Respondents are without merit and do not warrant the denial of LSC's Petition.

### A. The Constitutional Basis For The Second Circuit's Ruling On The Suit-For-Benefits Limitation Must Be Reviewed

Contrary to Respondents' suggestion, the principle of "constitutional avoidance" does not preclude the review of the court of appeals' First Amendment analysis of the suit-for-benefits limitation.

### 1. LSC's Program-Integrity Regulations Are Entitled To Full *Chevron* Deference

The first "alternative" non-constitutional grounds for affirmance offered by Respondents is that the program-integrity regulations promulgated by LSC[1] are an invalid interpretation of the 1996 Act, and that, in the absence of the regulations, the statute is unconstitutional. Respondents made this same argument in the court of appeals, which held that LSC is entitled to the full measure of deference under this Court's ruling in *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) and flatly rejected Respondents' statutory attack on the validity of the program-integrity regulations. *See* App. 11a-13a.

### 2. Respondents' "Ethics" Argument Is Not Properly Raised For The First Time In This Court

The second "alternative" grounds Respondents offer for affirming the ruling on the suit-for-benefits limitation is that LSC-funded lawyers are, in fact, not prohibited from contesting the constitutionality or legality of welfare laws when failing to do so would violate the Canon of Ethics.

Respondents failed to raise this argument in the court of appeals (or, for that matter, in the district court). Accordingly, they may not raise it now for the first time. *See Federal Trade Commission v. Grolier Inc.*, 462 U.S. 19, 23, n. 6 (1983) ("Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it"); *Jenkins v. Anderson*, 447 U.S. 231, 234, n.1 (1980) (Court refuses to consider argument that Respondent failed to raise in the courts below).

In any event, Respondents are wrong. Respondents hypothesize that in undertaking to represent a new client

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[1] These regulations are set forth at App. 112a-132a.

who wishes to challenge an existing welfare law, a conflict will arise between the lawyer's ethical duties and the suit-for-benefits limitation, and that the attorney will therefore have to undertake and continue the representation. In fact, the authority they cite for this proposition—an ethics opinion of the American Bar Association[2]—says no such thing.

What that opinion does say is that an LSC-funded lawyer who is considering undertaking a new representation should disclose to the client the limits on the prospective representation imposed by the 1996 Act and secure an agreement from the client that the lawyer will withdraw from the case if it becomes necessary to raise an argument that is covered by those limitations. The opinion notes that "[s]uch a limitation [on the scope of representation] is similar to other status regulations, such as income level requirements, that legal services organizations currently have in force." Finally, the opinion states the if the LSC-funded lawyer concludes that the limitations on the scope of the representation "would seriously compromise his (sic) duties to the client, she should not ask the client to accept such a restriction, but she should decline the representation . . ."

Thus, there is no support for Respondents' assertion that LSC Act and the Canon of Ethics, read together, permit an LSC-funded lawyer to challenge a welfare statute and still remain in the LSC program.

## B. The Second Circuit's Ruling Conflicts With The Decision Of The Ninth Circuit

As we previously explained (Petition at 20-21), one reason for granting certiorari is that the court of appeals' rul-

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[2] ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-399 (1996).

ing on the suit-for-benefits limitation conflicts with that of the Court of Appeals for the Ninth Circuit in *LASH III*.

Respondents claim that there is no conflict because the plaintiffs in *LASH III* attacked the 1996 Act "only insofar as it limited the use of non-federal funds by Legal Services grantees; they disclaimed any challenge to restrictions imposed upon LSC-funded attorneys who are paid out of federal funds. *The instant suit raises this unaddressed issue*." Respondents' Brief at 11-12 (emphasis added).

Respondents' argument is disingenuous at best. While it is true that the Amended Complaint challenges the restrictions imposed upon both federal and non-federal funds, in their motion for a preliminary injunction—which was the issue taken up on appeal—Respondents only challenged the restrictions on non-federal funds. JA at 130 (Notice of Motion).[3] Respondents reiterated this point in footnote 16 of their appeal brief ("[P]laintiffs seek preliminary injunctive relief *only in connection with the use of non-federal funds*") (emphasis added). Indeed, the court of appeals understood this to be the scope of the challenge to the 1996 Act that was before it. *See* App. 6a ("Plaintiffs sought a preliminary injunction only to enjoin the restrictions on the use of non-federal funds.")

Thus, contrary to Respondents' assertion, the rulings of the Courts of Appeal for the Second and Ninth Circuits with respect to the suit-for-benefits limitation are in conflict, and the petition should be granted in order to resolve this conflict.

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[3] References to "JA" are to the Joint Appendix submitted in connection with the appeal below.

### C. Respondents' Separation Of Powers Argument Is Not Properly Raised For The First Time In This Court

Respondents' last stab at supporting the court of appeals' decision is to argue that the suit-for-benefits limitation violates the separation of powers doctrine because the restrictions are an improper attempt by Congress to prevent the courts from deciding cases. Once again, Respondents may not raise this argument now because they did not raise it below. *See Grolier*, 462 U.S. at 23, n. 6; *Jenkins*, 447 U.S. at 234, n.1.

In any event, this argument is absurd. Under Respondents' theory, once the LSC program was created, *any* subsequent restrictions on the program, or indeed, a decision by Congress to merely reduce funding for the program—would violate the separation of powers doctrine.

### D. There Is No Reason To Grant Respondents' Petition

Finally, Respondents argue that if this Court grants LSC's Petition, it should also grant the Petition that they filed (*Velazquez et al. v. Legal Services Corp.*, (Docket No. 99-604)) and review that portion of the judgment in which the court of appeals unanimously upheld the constitutionality of the remaining provisions of the 1996 Act and implementing regulations. This attempted linkage should be rejected. As LSC explained in its brief in opposition to the *Velazquez* petition, that part of the judgment is fully consistent with this Court's prior decisions as well as with the Ninth Circuit's decision in *LASH III*. Accordingly, under this Court's well established rules, there is no basis for granting the *Velazquez* petition.

## CONCLUSION

For the reasons set forth above and in LSC's Petition, LSC's Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
March 13, 2000

Respectfully submitted,

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Nos. 99-603 and 99-960

# In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI IN NO. 99-603**
**FILED: OCT. 6, 1999**
**PETITION FOR WRIT OF CERTIORARI IN NO. 99-960**
**FILED: DEC. 6, 1999**
**CERTIORARI GRANTED: APR. 3, 2000**

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for writ of certiorari in *United States* v. *Velazquez*, No. 99-960:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 1-97cv182

VELAZQUEZ, ET AL.

*v.*

LEGAL SERVICES CORP., ET AL.

**Docket Entries**

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 1/14/97 | 1 | COMPLAINT filed and summon(es) issued for Legal Services Corp, Legal Services for FILING FEE $150.00 RECEIPT # 190973 (ac) [Entry date 01/17/97] |
| | | * * * * * |
| 1/27/97 | 4 | Pltffs' AMENDED COMPLAINT, (Answer due 2/6/97 for Legal Services for New York City, for Legal Services Corp.) amending [1-1] complaint (dr) [Entry date 01/30/97] |
| | | * * * * * |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 3/14/97 | 24 | USA's Notice of UNOPPOSED MOTION to intervene. (lg) [Entry date 04/16/97] |
| | | * * * * * |
| 3/20/97 | 11 | ANSWER to Complaint by Legal Services Corp. (lg) |
| 3/21/97 | 13 | Pltffs' MOTION for class certification & a preliminary injunction. Motion hearing 3/24/97 at 10AM. (lg) [Entry date 3/26/97] |
| 3/21/97 | 14 | Declarations & Affidavits in support of pltffs' motion for class certification & preliminary injunction. (Declarations & Affidavits A thru M annexed). (lg) [Entry date 3/26/97] |
| | | * * * * * |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 3/21/97 | 17 | Supplemental Affidavit & Declarations in support of pltffs' motion for class certification & preliminary injunction. (Affidavit & Declarations A thru D annexed). (lg) [Entry date 3/26/97] |
| | | * * * * * |
| 3/21/97 | 19 | Declarations in support of defts' opposition to pltffs' motion for a preliminary injunction. (Declarations A & B & Exhibits 2, 3, 4 & 5 annexed). (lg) [Entry date 3/26/97] |
| | | * * * * * |
| 3/26/97 | 22 | TRANSCRIPT of hearing before Judge Block filed for dates of 3/24/97. ESR Operator R. Eppenstein. (lg) [Entry date 03/27/97] |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 4/22/97 | 27 | LETTER dated 3/31/97 from Alan Levine to Judge Block, submitting this letter to request that the Court consider the following in connection with pltffs' motion for a preliminary injunction. (dr) |
| 6/17/97 | 28 | LETTER dated 5/22/97 from Alan Levine to Judge Block, advising the Court that, since oral argument in this matter LSC has made material changes to its regulations concerning "interrelated organizations", and "program integrity". (dr) |
| 6/18/97 | 29 | LETTER dated 5/29/97 from Jeffrey Markowitz to Judge Block, responding to the letter sent to the Court by Alan Levine, on behalf of deft LSC regarding promulgated regulations. (dr) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 7/30/97 | 32 | LETTER dated 5/27/97 from E. Joshua Rosekranz to Judge Block, requesting that the Court should enjoin the restrictions on the use of non-LSC funds. (dr) |
| 11/13/97 | 33 | LETTER dated 9/22/97 from Peter M. Fishbein to Judge Block re: plaintiffs' motion for a preliminary injunction. Final new regulations have been approved and a proposed plan for creating an affiliate entity has been concretely rejected by LSC pursuant to 45:1610. (rg) |
| 12/31/97 | 34 | MEMORANDUM AND ORDER denying plaintiffs' [13-1] motion for preliminary injunctive relief, as plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge. Signed by Judge Frederic Block on12/22/97. c/m (wa) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 1/12/98 | 35 | NOTICE OF APPEAL by Carmen Velazquez, WEP Workers Together, Community Service, New York City Co., Centro Independiente, Greater N.Y. Labor-, Farmworkers Legal, Lucy A. Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, Lauren Shapiro, C. Virginia Fields, Guillermo Linares, Stanley Michels, Adam Clayton Powell IV, Lawrence Seabrook, Scott M. Stringer. Fee Paid $ 105.00. Receipt # 202707 Notice of Appeal and certified copy of docket sent appealing [34-1] order. NOA served by the Clerk. Judge notified. C of A notified. (mcg) [Entry date 01/13/98] |

* * * * *

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 2/5/98 | 37 | LETTER dated 6/5/97 from Peter M. Fishbein to Judge Block that Jeffrey S. Markowitz' letter of 5/29/97 misses the point of plaintiffs' objections to LSC's latest version of its regulations in such a way as to illuminate the unconstitutionality of taking the Title X regulations approved in Rust and applying them willy nilly in the context of legal services. (rg) |
| 2/6/98 | 38 | ORDER dated 1/20/98 that defendant is ordered to provide plaintiffs with information regarding those applications for funding that have been submitted since issuance of its "final regulations" on 5/21/97, said information to include the name and address of all applicants, the date of the application, the nature of the application, the action taken by the defendant in respect therto, and any stated rea- |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| | | sons for the denial of any such applications. Defendant shall provide plaintiffs' counsel with access to such document for inspection and copying, at plaintiffs' own expense. All other discovery shall be stayed pending a decision from the Court of Appeals for the Second Circuit from this Court's denial of plaintiff's motion for a preliminary injunction. C/M (signed by Judge Frederic Block) (rg) |
| 2/11/98 | 39 | (copy) LETTER dated 9/25/97 from Jeffrey Markowitz, Esq., to Judge Block, stating that nothing in the 9/22/97 letter of Peter M. Fishbein affects or alters the inquiry before the Court. (wa) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 2/11/98 | 40 | (copy) LETTER dated 9/26/97 from Alan Levine, attorney for Legal Service Corp., to Judge Block, stating that no plaintiff has attempted to comply with the program integrity regulations and therefore the court should deny their request for a preliminary injunction. (wa) |

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 98-6006

VELAZQUEZ ET AL., PLAINTIFFS-APPELLANTS,

*v.*

LEGAL SERVICES CORP., DEFENDANT-APPELLEE,

*v.*

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE.

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**DOCKET ENTRIES**

| DATE | ENTRY |
|---|---|
| | * * * * * |
| 1/15/98 | Appellant's Carmen Velazquez et al. motion for injunction pending appeal or, in the alternative, expedited appeal FILED (w/pfs). [1110824-2] [Forwarded To AA] (ag42) |
| | * * * * * |

| DATE | ENTRY |
|---|---|
| 2/3/98 | Order FILED DENYING motion for injunction pending appeal and GRANTING motion to expedite appeal [1110824-2] by Appellant Carmen Velazquez, endorsed on motion form dated 1/15/98. "Denied As To An Injunction Pending Appeal And Granted As To An Expedited Appeal; Appellant Shall File A Brief And Appendix By February 17, 1998; Appellee Shall File A Brief by March 3, 1998; Appeal To Be Heard As Early As The Week Of March 16, 1998." [Per ALK, JMW] Judge Weinstein (EDNY) Recused Himself From Consideration Of This Matter. [FOR THE COURT:AH] (ag42) |
| | * * * * * |
| 3/20/98 | Case heard before JACOBS, LEVAL, GIBSON C.JJ. (TAPE: #183) (ca95) |
| | * * * * * |

| DATE | ENTRY |
|---|---|
| 1/7/99 | Judgment of the district court is AFFIRMED IN PART & REVERSED IN PART by published signed opinion filed. (PNL) [98-6006] (ag41) |
| 1/7/99 | Judge Jacobs DISSENTING in part in a separate opinion filed. (ag41) |
| 1/7/99 | Judgment filed. (ag41) |
| | * * * * * |
| 7/8/99 | Order FILED DENYING petition for REHEARING [1358922-1] & DENYING rehearing in banc [1358922-2] by Appellants Carmen Velazquez, Wep Workers Together, Community Service, NYC Coalition, Centro Independiente, Greater NY Labor, Farmworkers Legal, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, Lauren Shapiro, Andrew J. Connick, C. Virginia Fields, Guil- |

| DATE | ENTRY |
| --- | --- |
| | lermo Linares, Stanley Michels, Adam Clayton Powell Jr.IV, Lawrence Seabrook, M. Stringer, endorsed on motion dated 3/12/99., DENYING petition for REHEARING [1348987-1] & DENYING petition petition for rehearing in banc [1348987-2] by Appellee USA, endorsed on motion dated 2/26/99., DENYING petition for REHEARING [1349050-1] by Appellee Legal Services Corp. & DENYING petition petition for rehearing in banc [1349050-2] by Appellee Legal Services Corp., endorsed on motion dated 2/22/99. "A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of American and the appellants Carmen Velazquez et al. UPON consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED. It is further |

| DATE | ENTRY |
| --- | --- |
| | noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing en banc is DENIED." [For the Court: RAA, Acting Operations Manager] (ag41) |

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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Civil Action No. 97 CV 00182 (FB)

[CASE CAPTION OMITTED]

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**AMENDED CLASS ACTION COMPLAINT**

INTRODUCTORY STATEMENT

1. This is a civil action arising under Article III of the United States Constitution, and the First, Fifth, and Tenth Amendments thereto, challenging restrictions imposed by Pub. L. 104-134, 110 Stat. 1321, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, as reenacted by Pub. L. 104-208, 110 Stat. 3009, the Omnibus Consolidated Appropriations Act, 1997, on Legal Services attorneys seeking to provide effective legal representation to indigent clients. Pursuant to Pub. L. 104-208, attorneys employed by any entity receiving funds from defendant, LEGAL SERVICES CORPORATION ("LSC"), are unable to invoke many of the most powerful procedural tools generally available to other lawyers and their clients, to present certain substantive claims, or to represent certain classes of indigent clients who are in desperate need of legal assistance, even when such activities are funded wholly from non-federal sources. Among the restrictions challenged herein are the prohibitions against (1) participating in class actions on behalf of indigent clients; (2) challenging the constitutionality of certain welfare statutes; (3) challenging the legality of certain welfare regulations; (4) providing legal services to indigent, lawfully-admitted aliens; (5) seeking or accepting court-awarded attorneys' fees; (6) initiating participation in

legislative hearings or administrative rulemaking proceedings on behalf of indigent clients; (7) informing potential clients of their rights and offering to represent them, unless the potential client has affirmatively sought advice; and (8) providing legal services to incarcerated persons.

2. Plaintiffs allege that some, or all, of the restrictions imposed by Pub. L. 104-208: (1) abridge plaintiffs' freedoms of speech and association and the right to petition the government for redress of grievances in violation of the First Amendment; (2) deny indigent persons the equal protection of the laws in violation of the Fifth Amendment; and (3) ignore the principles of separation of powers and federalism in violation of Article III of the Constitution and the Tenth Amendment.

3. Defendants, acting under color of Pub. L. 104-208, have threatened to dismiss any attorney who provides legal services that are proscribed by Pub. L. 104-208, or to defund any program that permits an employee to engage in those proscribed practices, even when the services are funded exclusively by non-federal sources.

4. Upon information and belief, less than 50 percent of the funds received by Legal Services offices in New York City are provided by defendant LSC. More than one half the funds received by Legal Services offices in New York City are received from non-federal sources, including private donations and grants from state and local government agencies.

5. Upon information and belief, attorneys employed by entities that receive funding in whole or in part from defendant, LSC, ("Legal Services lawyers") representing indigent clients in over 630 class actions nationwide

have been forced to resign as class counsel, or have been forced to assume "non-adversary" monitoring status, pursuant to the command of Pub. L. 104-208. Since the enactment of Pub. L. 104-208, Legal Services lawyers have been forced to turn away numerous clients with meritorious claims, even though non-federal funds available to those lawyers would have paid for the representation.

## JURISDICTION AND VENUE

6. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1391(e).

## THE PARTIES

### The Client Plaintiffs

7. Plaintiffs, CARMEN VELAZQUEZ, WEP WORKERS TOGETHER!, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., NEW YORK CITY COALITION TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., and GREATER NEW YORK LABOR-RELIGION COALITION (occasionally referred to as the "client-plaintiffs"), are individuals, membership organizations, or nonprofit corporations that are represented by or have been represented by Legal Services lawyers, who have been injured by, and whose members have been injured by, the proscriptions of Pub. L. 104-208.

(a) Plaintiff, VELAZQUEZ, is an indigent individual and a welfare recipient who suffers from numerous severe and chronic medical ailments that impede her ability to work. Plaintiff, VELAZQUEZ, had been rep-

resented by a Legal Services lawyer in connection with a claim that, despite her efforts to comply with the City's Job Search program, New York City wrongfully penalized her welfare and Medicaid benefits for a period of three months in violation of federal and state law and state regulations. Pursuant to Pub. L. 104-208, plaintiff, VELAZQUEZ's, Legal Services lawyer was forced to resign from her representation of plaintiff, VELAZQUEZ, in this matter, because her claim challenged the legality of a welfare regulation. Efforts to obtain substitute counsel have failed, leaving plaintiff, VELAZQUEZ, without representation in her currently pending action.

(b) Plaintiff, WEP WORKERS TOGETHER! ("WEP WORKERS"), is a membership organization with offices in Brooklyn, New York, of welfare recipients residing in all five boroughs of New York City who are employed in "workfare" programs. Plaintiff, WEP WORKERS, is devoted to advancing the legal rights of its members through advocacy, organizing, and litigation. Plaintiff, WEP WORKERS, and its members have relied heavily on Legal Services lawyers in the past to advance their positions in courts and before state and local legislative and administrative bodies. Plaintiff, WEP WORKERS, cannot secure adequate legal representation because of the proscriptions of Pub. L. 104-208. For example, because of the proscriptions of Pub. L. 104-208, plaintiff, WEP WORKERS, and its members, may not be represented by a Legal Services lawyer before legislative and administrative bodies in New York State that are currently considering how to draft or implement the recent sweeping changes to the nation's welfare laws and regulations, except at the request of such bodies. Similarly, plaintiff, WEP WORK-

ERS, and its members cannot turn to Legal Services lawyers to challenge the constitutionality of certain federal or state welfare reforms that appear vulnerable to constitutional attack.

(c) Plaintiff, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC. ("CSS"), is a New York not-for-profit corporation that works cooperatively with community based organizations and other social policy and advocacy groups in all five boroughs of New York City to fight poverty through research and advocacy, community development, community organizing, litigation, and direct service Since its founding in the 1840s, plaintiff, CSS, has advocated for the health and welfare of New York City's poor residents. Through its activities, CSS has promoted and increased affordable housing stock for poor and homeless families in New York City and has been a strong voice for accessible health care, educational equity, full political participation for the poor, and fair, responsible welfare policies. For decades plaintiff, CSS, has worked closely with Legal Services offices in class action litigation, and has served as co-counsel in at least one case with MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LEGAL SERVICES FOR NEW YORK CITY, INC. ("LSNY"), and from non-federal sources. The current litigation work of plaintiff, CSS, depends on joint collaboration with Legal Services entities, including collaboration in class actions and in cases involving claims for attorneys' fees. Because of the proscriptions of Pub. L. 104-208, the ability of plaintiff, CSS, to collaborate with Legal Services entities and advocate on behalf of the poor through litigation has been greatly reduced.

(d) Plaintiff, NEW YORK CITY COALITION TO END LEAD POISONING ("NYCCELP"), is a membership organization founded in 1983 and composed primarily of parents, including low-income parents in all five boroughs of New York City, of children at risk of or suffering from lead poisoning. Plaintiff, NYCCELP, engages in education and advocacy on behalf of its members and their children. Plaintiff, NYCCELP, and its members have relied for legal assistance on entities that receive funding in part from defendant, LSC. Such legal assistance has included participation in class actions. Because of the proscriptions of Pub. L. 104-208, plaintiff, NYCCELP, its members, and their children, are no longer able to receive adequate legal representation from Legal Services lawyers employed by entities funded in part by defendant, LSC. For example, plaintiff, NYCCELP, is a plaintiff in an ongoing class action that seeks to force local and state officials to comply with federal, state, and local regulations involving lead poisoning prevention and treatment. Because of the proscriptions of Pub. L. 104-208, plaintiff, NYCCELP, has been deprived of the representation of its lead counsel, an employee of Bronx Legal Services, which has represented it in this class action for the past ten years.

(e) Plaintiff, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., ("INDEPENDENT FARMWORKERS CENTER") is a not-for-profit corporation representing farmworkers in the Hudson Valley Region of New York State that engages in education and advocacy activities on behalf of its members. Plaintiff, INDEPENDENT FARMWORKERS CENTER, and its constituents, have relied on plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., for legal

representation before state legislative and regulatory bodies, and for representation in litigation. Because of the proscriptions of Pub. L. 104-208, plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., has foregone Legal Services funding. Plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., has informed plaintiff, INDEPENDENT FARMWORKERS CENTER, that it will no longer be able to provide the level of legal services that it had provided prior to the effective date of the proscriptions, because of reductions in funding caused by Pub. L. 104-208.

(f) Plaintiff, GREATER NEW YORK LABOR-RELIGION COALITION ("GNYLRC"), is a network of trade union and religious leaders throughout New York City concerned with human rights. Plaintiff, GNYLRC, engages in legal advocacy on behalf of its members, and has relied for legal assistance on entities that receive funding in part from defendant, LSC. Such legal assistance has included participation in class actions. Because of the proscriptions of Pub. L. 104-208, plaintiff, GNYLRC, and its members, now are unable to receive the full and adequate legal representation that they previously had received from entities funded in part by defendant, LSC.

The Lawyer Plaintiffs

8. Plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC. ("FARMWORKERS LEGAL SERVICES"), is a not-for-profit legal advocacy organization that represents indigent clients, specifically migrant and seasonal farm workers, in litigation and before legislative bodies and administrative agencies. Plaintiff, FARMWORKERS LEGAL SERVICES, appears frequently before administrative and legislative

bodies to ensure that farm workers are not excluded from protective legislation, such as unemployment insurance, overtime pay, and labor laws. Much of its work depends upon its ability to represent groups of workers, both citizens and aliens, and to reach out to workers in isolated rural labor camps without telephones, educate them about their legal rights and offer to represent them. Prior to 1996, plaintiff, FARMWORKERS LEGAL SERVICES, received funding from defendant, LSC, but about half of its funds were from non-federal sources. In 1996, plaintiff, FARMWORKERS LEGAL SERVICES, terminated its relationship with and ceased receiving funding from defendant, LSC, because of the proscriptions of Pub. L. 104-208. Plaintiff, FARMWORKERS LEGAL SERVICES, rejected about $212,000 in federal money and saw its 1996 budget decline from $582,000 to $350,000. It has been forced to close one of three offices due to the funding cuts and has sharply curtailed its legal work. Plaintiff, FARMWORKERS LEGAL SERVICES, wishes to receive funding from defendant, LSC, but cannot receive such funding while at the same time fulfilling its obligations to its non-federal donors and providing full and adequate representation to its clients, because of the proscriptions of Pub. L. 104-208.

9. Plaintiffs, LUCY A. BILLINGS, PEGGY EARISMAN, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, and LAUREN SHAPIRO (occasionally referred to as the "lawyer-plaintiffs"), are attorneys employed, or formerly employed, by not-for-profit legal services organizations that receive funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiffs, BILLINGS, EARISMAN, STAMM,

and ZELHOF, currently are employed by such organizations. Plaintiffs, BENJAMIN, BOSKEY, and SHAPIRO, are attorneys formerly employed by such organizations who left their employment at those organizations because the proscriptions of Pub. L. 104-208 made it impossible to continue to fully and adequately represent their clients. Because of the proscriptions of Pub. L. 104-208, plaintiffs, BENJAMIN, BOSKEY, and SHAPIRO, have suffered loss of pay or benefits, or other economic harm. Each contemplates the possibility of working for an organization that receives federal funds, but would not do so as long as the restrictions are in place.

(a) Plaintiff, BILLINGS, is an attorney employed since 1989 by Bronx Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, BILLINGS, has been a Legal Services lawyer for over 25 years. Prior to the effective date of the proscriptions imposed by Pub. L. 104-208, plaintiff, BILLINGS, represented indigent persons in class action litigation in the areas of housing, health, and child welfare, coordinated and supervised the representation of indigent clients before legislative and regulatory forums, and engaged in client outreach and communication to determine critical problem areas requiring legal advocacy on behalf of indigent persons. Because of the proscriptions of Pub. L. 104-208, plaintiff, BILLINGS, is unable to continue to fully and adequately represent her clients at Bronx Legal Services, and has been forced to discontinue participation in many of the above-described activities. In particular, she has been forced to withdraw as counsel in an ongoing class action that seeks to enforce federal, state, and local regulations involving lead

poisoning prevention and treatment, a case in which she has served as lead counsel for ten years. In addition, because of the proscriptions of Pub. L. 104-208, plaintiff, BILLINGS, has been forced to reject at least five additional potential class actions on behalf of indigent clients.

(b) Plaintiff, EARISMAN, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, EARISMAN, has worked on behalf of indigent clients for nearly 20 years. While at MFY Legal Services, plaintiff, EARISMAN, has represented indigent clients in individual and class actions regarding public housing issues, has sought attorneys' fees on behalf of her clients, and has appeared before Congress, state legislatures, and local government bodies on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, EARISMAN, has been unable to bring as class actions several current lawsuits against New York City Housing Authority, has been unable to appear before government bodies on behalf of her clients, has been unable to seek attorneys' fees on behalf of her clients, and has been forced to decline representation of aliens in any type of case. In addition, plaintiff, EARISMAN, was required by Pub. L. 104-208 in at least one instance to temporarily decline representation of a client in a long-standing housing dispute, because the client was incarcerated in an unrelated matter.

(c) Plaintiff, STAMM, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Before the restrictions of

Pub. L. 104-208 went into effect, plaintiff, STAMM, sought attorneys fees' on behalf of her indigent clients in numerous cases involving single room occupancy housing, and appeared before legislative and administrative bodies on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, STAMM, is unable to seek attorneys' fees on behalf of her clients, is unable to appear before certain legislative and administrative bodies on behalf of her clients, except at the request of those bodies, and therefore is no longer able to fully and adequately represent her clients.

(d) Plaintiff, ZELHOF, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, ZELHOF, has worked at MFY Legal Services for nearly 10 years, and is now a Supervising Attorney at that organization. The specific project in which plaintiff, ZELHOF, works at MFY Legal Services receives absolutely no funding from defendant, LSC. Prior to the effective date of the proscriptions imposed by Pub. L. 104-208, plaintiff, ZELHOF, represented psychiatrically disabled clients in class action and other litigation, including class actions against adult home operators who wrongfully withheld personal needs allowance from her clients. In addition, plaintiff, ZELHOF, sometimes sought attorneys' fees on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, ZELHOF, no longer is able to bring such class actions, or to seek attorneys' fees, on behalf of her clients, and therefore is unable to fully and adequately represent her clients.

(e) Plaintiff, BENJAMIN, is an attorney who, from 1992 to 1996, was employed by Bronx Legal Services,

an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. While employed by Bronx Legal Services, plaintiff, BENJAMIN, represented indigent clients in individual and class actions challenging the legality of New York State welfare laws and regulations. She also participated in a variety of class action suits involving civil rights and disability law and lobbied federal, state and local officials. For example, plaintiff, BENJAMIN, served as project coordinator for the New York City Task Force on Medicaid Managed Care, an organization of 200 members engaging in lobbying on behalf of indigent persons before local, state, and federal government agencies and officials. These activities were supported in substantial part by non-federal funding, including $80,000 of funding from sources other than defendant, LSC. Because of the proscriptions of Pub. L. 104-208, plaintiff, BENJAMIN, was unable to fully and adequately represent her clients at Bronx Legal Services, and was forced in 1996 to end her employment at that organization in order to continue representing her clients and working in her area of expertise, welfare and Medicaid law. She has since moved to another employer, losing her seniority, where she engages in the practice she had developed at Bronx Legal Services.

(f) Plaintiff, BOSKEY, is an attorney formerly employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, BOSKEY, has been a Legal Services lawyer since shortly after graduating from law school in 1986. In 1989 she was elevated to the position of Managing Attorney of MFY Legal Services' SSI/SSD Project. Since 1993, she also had supervised a project funded by the Social Se-

curity Administration to locate and assist persons interested in filing applications for Supplemental Security Income. Before the proscriptions of Pub. L. 104-208 went into effect, plaintiff, BOSKEY, represented indigent and sometimes incarcerated clients in litigation involving welfare benefits, including litigation challenging the legality and constitutionality of welfare statutes and regulations, and had represented alien persons lawfully residing in the United States. Plaintiff, BOSKEY, also had served as counsel in four class actions, had brought individual actions challenging welfare laws, and commented on proposed regulations on behalf of indigent clients, and had regularly sought and obtained attorneys' fees for appeals to the federal courts. Her work was fully funded by grants from New York City, New York State, the Social Security Administration, and statutory attorneys' fees. None of her legal work has ever been funded by monies from defendant, LSC. Her caseload brought in between $40,000 and $150,000 per year in attorneys' fees alone. Because of the proscriptions of Pub. L. 104-208, plaintiff, BOSKEY, was unable to engage in many of the above-described legal advocacy activities while employed at MFY Legal Services. After the proscriptions of Pub. L. 104-208 went into effect, plaintiff, BOSKEY, was forced to reduce her work hours at MFY Legal Services to four days a week in order to fully and adequately represent her clients in pending litigation, lobbying needs, educating clients of their rights and offering to represent them, and other activities prohibited to Legal Services lawyers. Ultimately, she left her employment at MFY Legal Services in order to continue to fully and adequately represent her clients. Plaintiff, BOSKEY, suffered economic injury by being forced to reduce and then end her employment at MFY

Legal Services and to establish a not-for-profit legal advocacy organization, the Center for Disability Advocacy Rights, in order to continue to fully and adequately represent her clients.

(g) Plaintiff, SHAPIRO, is an attorney employed from 1986 until September, 1996, by South Brooklyn Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. From December, 1989, until September, 1996, plaintiff, SHAPIRO, acted as director of the HIV Unit at South Brooklyn Legal Services. The salaries of the HIV Unit's staff members were provided for in their entirety by funding raised by plaintiff, SHAPIRO, from sources other than defendant, LSC. Before the proscriptions of Pub. L. 104-208 went into effect, plaintiff, SHAPIRO, represented HIV-positive clients both in class action litigation involving welfare laws and regulations, and before legislative and administrative bodies. As a result of the proscriptions of Pub. L. 104-208, plaintiff, SHAPIRO, was forced to withdraw from two lawsuits regarding government benefits, one involving access of HIV-positive persons to emergency benefits and the other involving poverty law. She was forced to leave her employment at South Brooklyn Legal Services in order to continue to work on welfare reform issues on behalf of her indigent clients. In addition, as a result of the proscriptions of Pub. L. 104-208, plaintiff, SHAPIRO, was forced to withdraw as counsel in two pending actions involving government benefits issues.

The Donor Plaintiffs

10. Plaintiffs, ANDREW J. CONNICK, COUNCILMEMBER C. VIRGINIA FIELDS, COUNCILMEMBER

GUILLERMO LINARES, COUNCILMEMBER STANLEY MICHELS, COUNCILMEMBER ADAM CLAYTON POWELL, IV, SENATOR LAWRENCE SEABROOK, and ASSEMBLYMAN SCOTT M. STRINGER (occasionally referred to as the "donor-plaintiffs"), are individuals who have provided public or private non-federal funding to entities that also receive funds from the defendant, LSC, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208.

(a) Plaintiff, CONNICK, is an individual who has donated money to Legal Services for the Elderly, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, CONNICK, intended that the money he donated be used by Legal Services for the Elderly to provide representation for indigent clients in individual and class actions, including actions challenging the constitutionality of welfare statutes and the legality of welfare regulations, and to engage in other conduct proscribed by Pub. L. 104-208. Because of the proscriptions of Pub. L. 104-208, the funds donated by plaintiff, CONNICK, to Legal Services for the Elderly cannot be used for the purposes and to the full extent that they were intended.

(b) Plaintiff, FIELDS, is a New York City Councilmember representing Council District 9 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive

funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(c) Plaintiff, LINARES, is a New York City Councilmember representing Council District 10 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(d) Plaintiff, MICHELS, is a New York City Councilmember representing Council District 7 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(e) Plaintiff, POWELL, is a New York City Councilmember representing Council District 8 in New York and Bronx Counties, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(f) Plaintiff, SEABROOK, is a New York State Senator representing Senatorial District 33 in Bronx

County, who has voted to appropriate State funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York State Legislature and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(g) Plaintiff, STRINGER, is a member of the New York State Assembly representing Assembly District 67 in New York County, who has voted to appropriate State funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York State Legislature and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

The Defendants

11. Defendant, LSC, is a Congressionally-created nonprofit corporation established in 1974, authorized to do business in New York, whose directors are nominated by the President and confirmed by the Senate, charged with responsibility for providing legal services to indigent clients in civil cases. Upon information and belief, all funds provided to LSC are authorized and appropriated by Congress. During fiscal year 1996, LSC received two hundred eighty million dollars ($280,000,000). Defendant, LSC, expends millions of dollars per year in New York State by funding legal services entities directly and through defendant, LSNY. As part of its statutory mandate, LSC is responsible for distributing funds appropriated by

Congress "to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. § 2996e(a)(1)(A). LSC also is responsible for interpreting and enforcing any restrictions attached to those funds by Congress, including the restrictions on the use of non-LSC funds challenged in this case.

12. Defendant, LSNY, is a New York nonprofit corporation authorized by the First Department, Appellate Division, to practice law in the State of New York. LSNY serves as the umbrella organization for the receipt of LSC funds in the City of New York, and distributes $10 million of LSC funds in the City of New York per year to eleven Legal Services entities who employ lawyers to provide legal representation to indigent clients. Upon information and belief, all actions by LSNY relevant to this proceeding were taken in response to a threat by defendant, LSC, to terminate the funding of all or a part of the Legal Services program in the City of New York if attorneys employed by Legal Services offices in the City of New York continued to participate in class actions or to engage in other legal advocacy activities proscribed by Pub. L. 104-208. Upon further information and belief, defendant, LSNY, is acting in connection with all claims hereunder, as the agent, and under the direction and control of, defendant, LSC.

CLASS ACTION ALLEGATIONS

13. (a) Plaintiff, VELAZQUEZ, brings this action on behalf of herself, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, indigent individuals who are, or wish to be, represented by lawyers employed by entities receiving funds from LSC, and

who wish to assert legal claims as members of a class, to challenge the constitutionality or legality of welfare statutes or regulations, to be represented before legislative bodies and administrative agencies, or to assert some other legal claims proscribed by Pub. L. 104-208.

(b) The client-plaintiffs (other than plaintiff, VELAZQUEZ), bring this action in their respective individual capacities, on behalf of their respective members and constituencies, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated organizations and their members and constituencies; namely, indigent individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from LSC, and who wish to assert legal claims as members of a class, to challenge the constitutionality or legality of welfare statutes or regulations, to be represented before legislative bodies and administrative agencies, or to assert some other legal claim proscribed by Pub. L. 104-208.

14. FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., brings this action in its individual capacity, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated organizations; namely, organizations who wish to be eligible to receive funds from LSC, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208.

15. The lawyer-plaintiffs bring this action in their individual capacities, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving

funds from defendant, LSC, who wish to be free to represent indigent individuals in class actions, to challenge welfare statutes and regulations on behalf of indigents clients, to appear before legislative bodies and at administrative rulemaking proceedings on behalf of indigent clients, to seek and collect attorneys' fees on behalf of indigent clients, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208.

16. The donor-plaintiffs bring this action in their individual capacities, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from LSC, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208.

17. The persons and organizations described in paragraphs 13-16 are too numerous to be joined individually. The claims of the named plaintiffs in paragraphs 13-16 are typical of the claims of the classes, since common questions of law and fact are raised in each claim. The named plaintiffs in paragraphs 13-16 are fully qualified to represent the interests of the absent members of the respective classes. Defendants have acted on grounds generally applicable to all members of each class, thereby making appropriate final injunctive relief and declaratory relief with respect to each class as a whole.

FACTS

18. On April 26, 1996, President Clinton signed Pub. L. 104-134, an omnibus continuing budget resolution providing funds for the 1996 fiscal year. Pub. L. 104-134 imposed substantial restrictions on the freedom of attorneys employed by entities receiving funds from LSC to provide legal representation to indigent clients, including the ability to participate in class actions on behalf of their indigent clients; to challenge the constitutionality of certain welfare statutes; to challenge the legality of certain welfare regulations; to provide legal services to indigent, lawfully-admitted aliens; to accept court-awarded attorneys' fees; to participate in legislative hearings, or administrative rule-making proceedings, on behalf of indigent clients; to inform potential clients of their rights and offer to represent them, unless the potential client has affirmatively sought advice; or to represent incarcerated persons. Pub. L. 104-134 proscribed the foregoing activities even if they are wholly funded by non-federal and private sources. These proscriptions of Pub. L. 104-134 were reenacted in all relevant aspects on September 30, 1996, by section 502 of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208. The relevant provisions of Pub. L. 104-134 state:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency; that attempts to influence any part of any adjudicatory

> proceeding of any Federal, State, or local agency . . . designed for the formulation or modification of any agency policy of general applicability and future effect; that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar [legislative] procedure; that attempts to influence . . . oversight proceedings of the [LSC] . . .; that initiates or participates in a class action suit; that provides legal assistance for or on behalf of [certain categories of] alien[s] . . .; that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity . . .; that claims . . . , or collects and retains, attorneys' fees pursuant to any Federal or State law . . .; that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison; that . . . participates in any . . . way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system . . .; that defends a person in a proceeding to evict the person from a public housing project if . . . the eviction proceeding is brought [because of charges of illegal drug activity]; [or that] accept[s] employment resulting from in-person unsolicited advice to . . . obtain counsel or take legal action. . . .

Pub. L. 104-134, § 504(a). The pertinent portions of Pub. L. 104-134 and Pub. L. 104-208 are annexed as Exhibit A.

19. Pub. L. 104-134, as reenacted by Pub. L. 104-208, also appears to forbid Legal Services "entities" from using their non-federal funds to engage in any pro-

scribed activity, including participation in class action litigation, challenges to certain welfare statutes and regulations, appearances before legislative bodies and at administrative rulemaking proceedings except at the request of the body or agency, and other proscribed conduct, on behalf of their clients. Section 504(d)(1) of Pub. L. 104-134 states:

> The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

20. Defendant LSC has issued final rules implementing parts of Pub. L. 104-208, in addition to having issued interim rules implementing parts of Pub. L. 104-134. These regulations construe the proscriptions of Pub. L. 104-134 and Pub. L. 104-208 broadly. Among other things, the final rules make clear that the proscriptions apply almost in their entirety to the use of all non-federal and private funds that pass through Legal Services entities, and that the ban on "participation" in class actions is interpreted broadly to include filing an *amicus curiae* brief or representing individual plaintiffs in any case in which a class has been certified. 45 C.F.R. § 1610.3, 45 C.F.R. § 1617.2. Under the interim rules, Legal Services lawyers are barred from engaging in litigation challenging laws or regulations enacted as part of a reform of a state or federal welfare system, and may not even represent an individual client seeking relief from a welfare agency if the case involves a challenge to existing law. 45 C.F.R.

§ 1639.3, 45 C.F.R. § 1639.4. The interim rules interpret Pub. L. 104-134 to bar any contact with legislators on behalf of clients, and all participation in agency rule-making proceedings and adjudications intended to formulate or modify agency policy, except that non-federal funds may be used to respond to a written request from a government agency or official. 45 C.F.R. § 1612.3, 45 C.F.R. § 1612.6. Furthermore, under the interim rules, Legal Services lawyers may not represent certain aliens lawfully present in the United States. 45 C.F.R. § 1626.3 According to the interim rules, Legal Services lawyers may not represent incarcerated persons in civil matters, even where the incarcerated is based on arrest rather than actual conviction of a crime. 45 C.F.R. § 1637.3. According to the interim rules, Legal Services lawyers are restricted in their ability to advise potential clients of their rights and offer to represent them. 45 C.F.R. § 1638.3. The interim rules also make clear that Legal Services lawyers may not seek attorneys' fees or collect court-ordered attorneys' fees. 45 C.F.R. § 1642.3. Copies of the pertinent regulations issued pursuant to Pub. L. 104-134 and Pub. L. 104-208 by defendant, LSC, are annexed as Exhibit B.

21. In the short time that the proscriptions of Pub. L. 104-134 and Pub. L. 104-208 have been in effect, they have seriously impaired the constitutional rights of clients and potential clients of Legal Services offices, many of whom are indigent persons with no source of legal representation other than their local Legal Services office. Among the many effects of Pub. L. 104-134 and Pub. L. 104-208, for example:

(a) recipients of welfare have been unable to bring class actions or individual suits to challenge new welfare laws and regulations which affect them, or to be represented by an attorney before the legislative and regulatory bodies issuing new welfare laws and regulations except at the request of such bodies;

(b) indigent individuals have been unable to bring class actions to enforce Medicaid laws and regulations intended to insure early disease diagnosis and treatment in indigent children;

(c) residents of low-income housing have been unable to bring class actions to enforce federal, state, and local housing laws and regulations, including laws and regulations establishing housing quality standards, laws and regulations intended to protect children from lead poisoning, and other laws and regulations intended to protect the health and safety of such residents;

(d) residents of low-income housing have been unable to bring class actions to enforce federal laws mandating the provision of job training and job opportunities at HUD rehabilitation and building projects, or against their landlords' unfair and deceptive collection and business practices, including practices in violation of federal law;

(e) many indigent persons have been unable to bring even non-class actions through their local Legal Services offices to enforce housing laws and regulations, or other federal, state, and local laws and regulations, because of the inability of Legal Services lawyers to seek or collect attorneys' fees;

(f) many aliens lawfully present in the United States have been unable to secure legal representation to enforce labor laws intended to protect them, or to advocate on their behalf before legislative bodies and regulatory agencies that are considering laws and regulations affecting them; and

(g) many indigent persons have been unable to bring actions to enforce their legal rights and to protect their health and welfare, because Legal Services lawyers are forbidden to inform such persons of their legal rights and to offer to represent them, unless the potential client has affirmatively sought advice.

CAUSES OF ACTION RELATING
TO THE RESTRICTIONS ON THE USE OF
NON-FEDERAL FUNDS

22. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, including participation in any class action, and by prohibiting lawyer-plaintiffs from informing potential clients of their rights and offering to represent them except when the potential client has affirmatively sought advice, impinges directly on plaintiffs' freedom of speech and freedom to associate with one another in pursuit of common objectives and, thus, violates the First Amendment to the Constitution of the United States.

23. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, impinges directly on the

First and Tenth Amendment freedoms of non-federal donors to contribute funds to entities receiving support from LSC in order to assure that indigent persons receive adequate legal representation.

24. Pub. L. 104-208, by making it impossible for an indigent client represented by a Legal Services lawyer using non-federal funds to raise significant procedural and substantive arguments against unlawful governmental action, and by prohibiting Legal Services lawyers using non-federal funds from attempting to influence regulatory or legislative action on behalf of indigent clients, violates the right to petition the government for redress of grievances.

25. Pub. L. 104-208 denies indigent litigants the equal protection of the laws in violation of the Fifth Amendment, by denying indigent litigants represented by a Legal Services lawyer with non-federal funds the benefit of procedural techniques, such as the class action; substantive defenses, such as the unconstitutionality of welfare statutes; statutory rights, such as the right to seek and collect attorneys' fees in certain cases; and other rights, such as the right to petition government in an attempt to influence regulatory or legislative action, that are fully available to more affluent clients.

26. Pub. L. 104-208, by requiring Legal Services lawyers with non-federal funds to withdraw from pending legal proceedings, and/or to confine their representation of existing clients to "non-adversary", "passive" monitoring of existing class action decrees, violates the structural autonomy of the Article III courts, and the 10th Amendment autonomy of the state courts,

by directly interfering with the ongoing progress of pending cases.

27. Pub. L. 104-208, by placing restrictions on the ability of Legal Services lawyers to use non-federal funds to fully and adequately represent their indigent clients, interferes with the ability of state and local government donors to allocate funds toward the purposes they deem necessary, in violation of the Tenth Amendment.

28. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to utilize all lawful means to advance the best interests of their indigent clients, is inconsistent with the Canons of Ethics, and the Code of Professional Responsibility, as those provisions are codified in the enabling statutes of LSC.

29. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, imposes unconstitutional conditions on the receipt of federal funding; namely, a forced waiver of plaintiffs' First Amendment freedom to provide and receive untrammeled legal advice in the context of a traditional lawyer-client relationship, the freedom of association, and the right to petition government for redress of grievances; and plaintiffs' Fifth Amendment rights to equal protection of the laws.

CAUSE OF ACTION RELATING TO THE RESTRICTIONS ON THE USE OF FEDERAL FUNDS

30. Pub. L. 104-208, by forbidding the lawyer-plantiffs from representing the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, when such representation is funded by federal sources, abridges plaintiffs' freedom to associate with one another, freedom of speech, freedom to petition the government for redress of grievances, and right to equal protection of the laws; violates the principles of separation of powers under Article III of the Constitution and the principles of federalism under the Tenth Amendment; imposes unconstitutional conditions on the receipt of federal funding; and is inconsistent with the Canons of Ethics and the Code of Professional Responsibility, as those provisions are codified in the enabling statutes of LSC.

31. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request the Court to:

(1) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to participate in class actions, even when the participation is funded solely by non-federal sources, violate the First and Fifth Amendments to the Constitution of the United States, principles of separation of power inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(2) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving

funds from LSC from challenging certain welfare statutes and regulations, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the Constitution of the United States, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(3) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to appear before any legislative body or to participate in any administrative rule making proceeding except at the request of the body or agency, on behalf of an indigent client, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the United States Constitution, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(4) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to seek attorneys' fees on behalf of indigent clients, to represent lawfully admitted aliens or incarcerated persons, or to inform potential indigent clients of their rights and offer to represent them except when the potential client has affirmatively sought advice, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the United States Constitution, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(5) grant appropriate preliminary, and final, equitable relief enjoining defendants, LSC and LSNY, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using non-federal funds to participate in a class action, to challenge the constitutionality of welfare statutes, to challenging the legality of welfare regulations, to seek or accept attorneys' fees on behalf of indigent clients, to appear before any legislative body or to participate in any administrative rule making proceeding on behalf of an indigent client, except at the request of the body or agency, to represent lawfully admitted aliens or incarcerated persons, or to inform potential indigent clients of their rights and offer to represent them except when the potential client has affirmatively sought advice;

(6) declare that the provisions of Pub. L. 104-208 must be read in harmony with the enabling statute creating LSC requiring Legal Services lawyers to act in accordance with the Canons of Professional Ethics, and the Code of Professional Responsibility;

(7) declare that the proscriptions imposed by Pub. L. 104-208 on the use of LSC funds to participate in class actions, to challenge certain welfare statutes and regulations, to provide legal services to certain aliens, to seek or accept court-awarded attorneys' fees, to participate in legislative hearings or administrative rulemaking proceedings on behalf of indigent clients, to inform potential clients of their rights and offer to represent them except when the potential client has affirmatively sought advice, and to provide legal services to incarcerated persons, violate the First and Fifth Amendments to the Constitution of the United States,

and principles of separation of powers inherent in Article III;

(8) grant appropriate preliminary, and final, equitable relief enjoining defendants, LSC and LSNY, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using federal funds to engage in conduct proscribed by Pub. L. 104-208; and

(9) grant such other and further relief as the Court shall deem proper, including the award of reasonable attorneys' fees.

Dated: New York, New York
January 27, 1997

**THE BRENNAN CENTER FOR JUSTICE**

By: /s/ BURT NEUBORNE
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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Civil Action No. 97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

AGAINST

LEGAL SERVICES CORPORATION, ET AL.,
DEFENDANTS

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**NOTICE OF MOTION FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION**

To: Legal Services Corporation
750 1st Street N.E.
Washington, DC 20002

Legal Services for New York City, Inc.
350 Broadway
New York, NY 10013

**PLEASE TAKE NOTICE** that plaintiffs, pursuant to Federal Rules of Civil Procedure 23(c)(1) and 65, upon the accompanying declarations of Lucy A. Billings, Jill Ann Boskey, Juan Cartagena, Megan Charlop, Andrew J. Connick, Stanley E. Michels, Burt Neuborne, Adrian Ramirez, James Schmidt, Olive Karen Stamm, and Jeanette Zelhof, the accompanying affidavits of Peggy Earisman and Carmen Velazquez, and the exhibits thereto, and for the reasons set forth in the accompanying memorandum of law, will move this Court before the Honorable Frederic Block on February 14,

1997, at 10:00 a.m., or as soon thereafter as counsel can be heard, at Courtroom 15 of the Courthouse of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY, for an order:

(1) determining that, as demonstrated in plaintiffs' Amended Class Action Complaint, this action complies with the prerequisites of Rule 23(a) in that the classes are so numerous that joinder is impracticable, there are questions of law of fact common to all classes, the claims of the representative parties are typical of the claims of the classes, and the representative parties will fairly and adequately protect the interests of the classes; this action complies with the requirements of Rule 23(b)(2) in that the defendants have acted or refused to act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole; and this action therefore is maintainable as a class action under Rule 23(b)(2); and

(2) preliminary enjoining the defendants, Legal Services Corporation ("LSC") and Legal Services for New York City, Inc. ("LSNY"), their officers, agents and employees, and all those in concert or participation with them, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using non-federal funds to participate in a class action, to challenge the constitutionality of welfare statutes, to challenge the legality of welfare regulations or statutes, to seek or accept attorneys' fees on behalf of indigent clients, to appear before any legislative body or to participate in any administrative rulemaking proceeding on behalf of an indigent cli-

ent, to represent aliens or incarcerated persons, or to approach potential indigent clients to inform them of their rights and offer to represent them, until a final hearing and determination of the merits in the above-entitled action, and for such other and further relief as to this Court may seem just and proper.

Unless defendants are restrained and enjoined by order of this Court, plaintiffs will suffer immediate and irreparable injury, loss and damages in that their First, Fifth and Tenth Amendment rights are being violated, thousands of indigent clients' legal needs are not being met as Legal Services lawyers have been forced to turn away clients with meritorious claims, countless urgent lawsuits that cannot be brought are languishing and are in danger of being time barred or too late to be of value, and Legal Services lawyers in hundreds of ongoing class actions have been forced to resign as class counsel. Plaintiffs have no adequate remedy at law. The immediate and irreparable injuries faced by plaintiffs are more fully described and set forth in the Amended Class Action Complaint filed in this action, and the memorandum of law and accompanying declarations and affidavits, and exhibits thereto, submitted in support of this motion.

Dated: New York, New York

January 27, 1997

THE BRENNAN CENTER FOR JUSTICE

By: /s/ BURT NEUBORNE

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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97 CV 0182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION AND
LEGAL SERVICES FOR NEW YORK CITY, INC.,
DEFENDANTS

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AFFIDAVIT OF CARMEN VELAZQUEZ

STATE OF NEW YORK)
) ss.:
BRONX COUNTY )

CARMEN VELAZQUEZ, being duly sworn, deposes and says:

1. I am a class plaintiff in the above-referenced lawsuit. I submit this affidavit in support of plaintiffs' application for a preliminary injunction to prohibit defendants LEGAL SERVICES CORPORATION ("LSC") and LEGAL SERVICES FOR NEW YORK CITY, INC. ("LSNY") from enforcing unconstitutional restrictions, specifically those proscribing the use of non-federal funds, by Legal Services entities. Unless indicated otherwise, I base this affidavit upon personal knowledge.

2. I am a 56 year-old grandmother in the South Bronx. I came to the United States in 1973 from Ecuador. I am proud to say that I became a United States citizen a year ago. I always thought of the United States as a land of opportunity, a land where you could make something of yourself and your family. I thought of the United States as a place where people, especially the poor, were treated fairly.

3. From the time I arrived in the United States with my children I worked hard to support them. In the late 1980s, I was stricken with several serious medical conditions that made it impossible for me to work. For example, I developed severe allergies to many common chemicals, such as soaps and detergents, that I worked with. I had to stop working and rely on public assistance.

4. The welfare payments I had been receiving—$348 per month—are not even enough to cover my rent, so my family helps to make up the difference. I rely on food stamps to feed myself. Medicaid covers the prescriptions that are necessary for me to maintain my health.

5. Late in 1995, I received a letter informing me that I was required to participate in the City's Job Search program. The letter set an appointment. Because I knew that I would not be able to keep the appointment, I had a neighbor telephone the agency and ask whether I could reschedule. My neighbor was told that rescheduling would not be a problem. She was told that I would get a new notice with a new appointment.

6. Instead, I received a notice that I was required to appear before a judge at a Fair Hearing. I went by

myself, with no lawyer. No one explained to me what was happening. I never had an opportunity to talk to anyone about the medical conditions that preclude me from working. I was simply told that a decision would be made soon and I would find out about it in the mail.

7. In February 7, 1996, I went to the drug store to fill a prescription that was necessary to my health. The druggist told me that my Medicaid coverage had been terminated. That was the first that I heard of the Fair Hearing Decision to sanction me for three months for refusing to participate in the jobs program.

8. Those three months—the months of February, March, and April of 1996—were horrible for me. I could not pay my rent. I could not buy food. I could not even fill the prescriptions that my doctor ordered me to take. The City paid my rent, but I have to repay the loan; to this day, the City reduces my payments by $30 per month. This seemed wrong. I could not believe that my lifeline could be cut without ever giving me a chance to tell someone about my medical condition.

9. I could not afford a lawyer, but I learned from a social worker that Legal Services lawyers could help me. I visited the Legal Services office in the Bronx and I met with Elisabeth Benjamin. Ms. Benjamin listened to my case, told me about my rights, and agreed to represent me. I did not understand all the legal arguments that she was going to make, but I now understand that she was arguing that a portion of the state law that cut off my benefits violates a federal law. What I did understand for as long as Ms. Benjamin handled my case was that she was going to fight her hardest to make sure that my rights were protected. I felt comfortable with her. I saw her several times over

the next few months. Ms. Benjamin fought for me in court and I was pleased with how she handled my case.

10. After the case was sent to the appeals court, I learned that Ms. Benjamin and Bronx Legal Services had to abandon my case. I understand that they were required by a federal law to stop fighting my case because my case involves a challenge to a welfare law, and Legal Services lawyers, like Ms. Benjamin, are not allowed to make those arguments. I am also told that Bronx Legal Services was not allowed to handle my case even though they had money from places other than the federal government.

11. I understand that my case must be transferred to an appeals court and a brief must be filed by January 29, 1997. I cannot file my appeal without a lawyer.

12. I feel personally offended that our government in this land of opportunity would pass a law that tells my lawyer that she is not permitted to do everything she can to protect my rights. I do not understand how the government can give me a really good lawyer and slap her down as soon as she starts making arguments that could help me. I feel like the law discriminates against me because a lawyer who is paid would be permitted to make any argument for his client.

14. I understand that Bronx Legal Services has asked at least six lawyers to take my case. None of them is able or willing to do it. I will probably not be able to take the appeal that I have a right to take.

15. I hope I will never face the problem that I faced last spring. But my medical condition has not changed and I am worried that my benefits will be cut off again,

with no opportunity to explain the difficulties of my medical condition. If I do face this or other legal problems, I will surely call Bronx Legal Services, for I have great confidence in their legal skills. I worry that they will not be allowed to represent me at all or that they will not be allowed to represent me as well as they can, if I do have other legal problems.

16. My native language is Spanish. I have had my son, Frank Villavicencio, who is bi-lingual, look over this affidavit and translate it for me before I signed it.

/s/ CARMEN VELAZQUEZ
CARMEN VELAZQUEZ

Sworn to before me
this 22 day of January, 1997

[illegible signature]
Notary Public

**JAYSON LUTZKY**
**NOTARY PUBLIC STATE OF NEW YORK**
**No. 31-4795700**
**Qualified in Westchester County**
**Commission Expires August 31, 1997**

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION, ET AL.,
DEFENDANTS

---

**DECLARATION OF JOHN A. TULL**

I, John A. Tull, declare as follows:

**Professional Background**

I. I am currently the Director of the Office of Program Operations (OPO) of the Legal Services Corporation ("LSC"). I have been the Director of OPO and its predecessor organizations within LSC since January 1994. During a part of this time, I was also Acting Director of the Office of Program Services. I previously worked for LSC from March 1980 through December 1984 as Regional Counsel of the Denver Regional Office of the Office of Field Services. Before joining the Legal Services Corporation, I was a Reginald Heber Smith Fellow for two years with the Legal Aid Society of the Pima County Bar Association, and then continued as a staff attorney for several years. That organization was renamed Southern Arizona Legal Aid, and I was its Executive Director for approximately six years. Between 1984 and 1993, I did

private consulting work with legal services programs, IOLTA funders, bar associations (including the American Bar Association) and others involved in the delivery of legal services to the poor. During my career, I have served as the Reporter to the American Bar Association and its Standing Committee on Legal Aid and Indigent Defendants in the development of the Standards for Providers of Civil Legal Services to the Poor (adopted in 1986), and the Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor (adopted in 1991).

2. The primary duties and responsibilities of OPO are: (a) to ensure that grant funds are awarded pursuant to a system of competition and in a manner that promotes the efficient and effective delivery of legal services to eligible clients; and (b) to enforce the statutory and regulatory provisions governing LSC grantees.

**Transition to New Program Requirements**

3. My duties include oversight responsibility for the implementation by LSC recipients of the changes required by the interim and final regulations issued by LSC in 1996. One of the most difficult and complicated transition issues for many recipients concerned the timely disposition of pending cases involving matters which could no longer be handled by LSC recipients. In particular, under the new rules, recipients could no longer be involved in any class action suits or represent certain ineligible aliens or prisoners. Recipients were required by the law to dispose of or otherwise disengage themselves from all such pending restricted matters by August 1, 1996.

4. Between enactment of the 1996 appropriations and the August 1, 1996 implementation deadline, recipients had a transition period of approximately 90 days in which to dispose of their pending caseload involving class actions, ineligible aliens or prisoners. During the transition period, many cases were settled or otherwise terminated. Where cases could not be terminated, the recipient was required either to locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer their open matters in a manner consistent with their professional responsibilities to their clients.

5. During this transition period, recipients nationwide reported that they had completed or otherwise disposed of 630 class action cases, 428 matters involving prisoners, and 2,991 matters involving ineligible aliens. In connection with this withdrawal, the Executive Directors of recipients were required to submit certifications that their program was able to dispose of all of its pending restricted cases and was in compliance with the statutory prohibitions concerning class action suits, ineligible aliens, and prisoner litigation on or about August 1, 1996. As a rule, I understand that recipients nationwide were able to complete their withdrawals in such a manner so as to safeguard the interests of the affected clients. Annexed as Exhibit 1 hereto are reports received from legal service providers that receive LSC funds through Legal Services of New York, certifying their compliance status on or about August 1, 1996.

6. Arranging for the withdrawal from and the transfer of on going matters and cases to other counsel

took several months to complete. It is simply not possible to undo these arrangements at this time. Many of these matters have been resolved—by settlement or otherwise—in such a way as to preclude the reopening of these cases now. As to ongoing cases, in my opinion, attempting to return these matters to the LSC grantees would create confusion and uncertainty that intrudes on the attorney-client relationships that have developed in the six months since the transfers occurred.

7. The only plaintiff that was a recipient prior to August 1, 1996, Farmworkers Legal Services of New York ("FLSNY"), decided that it would discontinue receiving LSC funds as of July 1, 1996. A letter from FLSNY to LSC, dated June 12, 1996, is annexed hereto as Exhibit 2. The funds which had previously been granted to FLSNY to provide legal representation to aliens have been distributed to another legal aid provider. Under LSC's funding cycle, the next round of funding decisions will not take place until November 1997, for the grant year beginning January 1998. Therefore, if the court grants the preliminary injunction and FLSNY were to seek to resume receiving funds, it would have to compete with other eligible organizations with no guarantee that it would prevail in the competition. If FLSNY were selected to receive LSC funds, it would not receive them until January of the 1998 grant year.

8. No plaintiff in this case is a recipient currently operating under the recently enacted restrictions.

**LSC's Policy Regarding Interrelated Organizations**

9. In the course of my duties, I have become familiar with, and have oversight responsibility for, application of LSC's interrelated organization policy. An interim rule regarding interrelated organizations has been published in the Federal Register today, March 14, 1997. The rule is effective immediately. A copy of the rule, as published in the Federal Register, is annexed hereto as Exhibit 3.

10. The purpose of the new rule is to allow a recipient entity to exercise its constitutional rights to the fullest extent through separate organizations with which the recipient has an affiliation or relationship. Specifically, the new rule permits recipients to have an affiliation or relationship with separate organizations that may engage in prohibited activities funded solely with non-LSC funds, provided certain standards for program integrity are met. Thus, the new rule permits a recipient to control another organization, without the latter being subject to the federal restrictions that govern the use of LSC funds, as long as there is a wall of separation between the recipient and the other organization so that LSC funds will not be used to subsidize prohibited activities.

11. The new rule has two parts: a test of interrelatedness based on a determination of "control" (§ 1610.8(a)), and a test of "program integrity" (§ 1610.8(b)). The determination of control is fact-intensive and can be made only considering the totality of circumstances concerning the relationships between the organizations. Relevant factors include the extent to which the organizations share directors, officers, and

managers; the nature of contractual and financial relationships; and the history of the relationships and identity of interests among the organizations. Only one of these factors is dispositive, by itself; if the governing body of one organization includes enough officers and directors of the other to cause or prevent action by the other, then the entities will be deemed to be in a "control" relationship. § 1610.8(a)(3).

12. Even if a recipient and a non-recipient are found to be in a "control" relationship, the non-recipient will still not be subject to the federal restrictions as long as the standards for program integrity are met. Program integrity requires that: (1) the non-recipient receives no LSC funds, and LSC funds do not directly or indirectly subsidize restricted activities; (2) the relationship with the non-recipient is approved by the recipient's governing body; and (3) the recipient is physically and financially separate from the non-recipient. The determination of physical and financial separation is based on factors that I understand the Supreme Court approved in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), with respect to the regulations construed therein. These factors include the existence of separate personnel, facilities, accounting and timekeeping records, and the extent to which signs and other forms of identification distinguish the recipient from the non-recipient.

13. Under the new rule, a recipient may use non-LSC funds as "seed money" to establish an affiliated or related non-recipient organization to engage in prohibited activities, as long as the two organizations are not found to be in a "control" relationship, or, if they are in a "control" relationship, so long as the "program integrity" standards are satisfied. In addition, a recipient

may employ part-time non-managerial staff who also work part-time for an independent unsubsidized entity, without the latter being subject to the federal restrictions, so long as the two organizations are not found to be in a "control" relationship.

**LSC's Previous Interrelated Organizations Policy**

14. LSC's previous policy governing interrelated organizations was formally adopted in the 1986 LSC Audit and Accounting Guide, in Section 1-7. The relevant provisions were incorporated verbatim in my December 11, 1995 letter to all LSC grantee program directors, a copy of which is attached hereto as Exhibit 4.

15. LSC's previous policy was virtually identical to the first prong of the new rule, that is, so long as a recipient and an independent unsubsidized organization were not in a "control" relationship, and the recipient did not transfer funds to the unsubsidized organization, the latter could engage in prohibited activities. The determination of control was based on the same analysis discussed above. The only difference was that the previous policy did not explicity provide that under certain circumstances, the overlap of officers and directors could be a dispositive factor.

16. LSC also previously had a regulation concerning the transfer of funds from a recipient to a non-recipient. A copy of this regulation was attached to one of the declarations submitted by plaintiffs on this motion. *See* Neuborne Dec. Ex. 2 (45 C.F.R. § 1610.7). Under this previous regulation, if the transferred funds derived from LSC, then the entity that received the funds was subject to the same federal restrictions as if it were

directly funded by LSC. However, if the transferred funds did not derive from LSC, then the entity that received non-LSC funds was subject to the federal restrictions of an LSC recipient only insofar as it used the transferred funds. The new rule has eliminated this regulation on transfers of non-LSC funds, so that non-LSC funds can be transferred without the use of the funds being subject to any federal restrictions. *See* Ex. 3 at 3 (§ 1610.7, as amended effective today).

17. To the best of my knowledge, since the new restrictions became effective, LSC has not considered the application of the interrelated organization policy or the funds transfer policy to any of the named plaintiffs in this action.

18. I understand that a federal district court in Hawaii has recently ruled that the plaintiffs in a litigation filed there have a fair likelihood of establishing that LSC's previous interrelated organizations and transfer of funds policies unconstitutionally restrict recipient entities from engaging in certain activities. I understand that the essence of the court's decision was that LSC's previous policy was more restrictive than the policies adopted by the Department of Health and Human Services ("HHS") that were construed by the Supreme Court in *Rust*. Thus, the district court held that recipient organizations did not have sufficient freedom to express themselves through "alternative channels" not subject to federal restrictions. *Legal Aid Society of Hawaii* v. *LSC*, Civ. No. 97-00032 (*LASH*), slip op. at 23-30 (annexed hereto as Exhibit 5).

19. I respectfully submit that the court in Hawaii misconstrued LSC's previous policies. For example, the court ruled that "although the LSC regulations do

not explicitly forbid the overlap of employees, the broad definition of interrelatedness, in practice, serves to prevent one organization from having the same personnel of another." *LASH*, slip op. at 27. In fact, the previous policy provided that the "[e]xtent and pattern of any overlap of officers, directors, or other managers among organizations" was one out of eight factors that LSC would consider. Ex. 4 at 2-3. But if a recipient and a non-recipient organization had common staff who were not officers, directors, or managers, this commonality was not even a factor that LSC considered in determining control. Thus, LSC consistently applied the policy to permit non-interrelated organizations to share part-time staff without either organization being deemed to be under the "control" of the other.

20. I understand that the district court in Hawaii also relied on the fact that the HHS regulations construed by the Supreme Court in *Rust* permitted a recipient to "operate" separate projects not subject to federal restrictions, as long as those projects were "physically and financially separate" from the federally funded programs. In the Hawaii court's view, LSC's previous interrelatedness policy did not permit a recipient to "operate" another entity without subjecting the latter to the federal restrictions since such a relationship would have constituted "control" under the policy. *LASH*, slip op. at 27-29. The new rule that became effective today, which is discussed above at ¶¶ 9-13, was promulgated to address this concern.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 1997.

/s/ JOHN A. TULL
JOHN A. TULL

[Emblem omitted]

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**MEMORANDUM**

To: Program Directors

From: John A. Tull, Director
Office of Program Evaluation,
Analysis & Review

Subject: Applicability of Restrictions to Interrelated Organizations

Date: December 11, 1995

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The impending adoption of significant new restrictions on the range of permitted activities for LSC-funded programs and the extension of these restrictions to all funds received by these grantees has led to the exploration in state planning processes and elsewhere of various options to allow the representation of clients on restricted matters with non-LSC funds. Such representation by organizations that do not receive LSC funds directly or by sub-grant is, of course, legitimate. However, if the non-LSC organization is so

closely related to an LSC funded grantee that the two are deemed to be "interrelated organizations," all LSC restrictions will extend to both organizations.

Based on a GAO Report, dated August 22, 1985,[1] the 1986 LSC Audit and Accounting Guide, in Section 1-7, adopted a definition of and rules concerning "interrelated organizations". The standard set forth in the 1986 Audit Guide will determine when LSC will treat entities that are related to LSC recipients as interrelated organizations for purposes of determining if LSC restrictions apply to that organization. The provision in its entirety is as follows:

"1-7 INTERRELATED ORGANIZATIONS

For a recipient that controls or is controlled by another organization, it is presumed that combined financial statements are more meaningful than separate statements and are usually necessary for a fair presentation in conformity with generally accepted accounted principles. Control means the direct or indirect ability to (a) determine the direction of management and policies; or (b) influence the management or policies of another organization to the extent that an arm's length transaction may not be achieved. Control is a question of fact and must be determined by the overall circumstances of the relationship between organizations. Important facts relevant to this determination are:

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[1] GAO Report B-202116, August 22, 1985, entitled "The Establishment of Alternative Corporations by Selected Legal Services Corporation Grant Recipients."

(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations;

(b) Contractual and financial relationships (especially in terms of the proportion of a possibly controlled organization's funds or resources that are provided by the controlling organization);

(c) History of relationships among the organizations (e.g. the fact that one organization provided initial funding and named initial directors of another would be a relevant fact; as would facts relating to decision-making on policies or transactions of mutual interest; actual control of particular decisions);

(d) Close identity of interest;

(e) One organization has become a mere conduit, "incorporated pocketbook," or "straw" party for another whether or not there was an attempt to work an injustice or promote a fraud;

(f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient and substantially all of the funds solicited are intended by the contributor or are otherwise required to be transferred to the recipient or used at its discretion or direction;

(g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and,

(h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions.

These facts and all relevant facts must be carefully weighed in each situation to determine whether control exists; if there is a basis for a reasonable doubt as to whether control exists, that basis should be disclosed by the recipient. There is a presumption that an ongoing relationship between a recipient and a bar association does not constitute an interrelationship as contemplated in this section.

If one organization controls another but the financial statements are not combined, the facts of the relationship shall be disclosed along with a statement as to the reasons why combined financial statements were not presented and the financial statements of controlling or controlled organizations shall be included. If financial statements are combined, the facts of the relationship shall be disclosed.

Funds held by an organization which controls, is controlled by, or is subject to common control with, a recipient or subrecipient are subject to the same restrictions as if the funds were held by recipient or subrecipient." (emphasis added)

Regardless of whether a recipient has chosen to be subject to the 1981 or the 1986 Audit and Accounting Guide,[2] LSC will consider the funds of interrelated organizations to be subject to all the restrictions on the use of non-LSC funds that would apply to the recipient, even if the interrelated organization does not formally receive any LSC funds. The basis for this policy is that

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[2] While the LSC Board has adopted a new 1995 Audit Guide, it does not supersede this portion of the 1986 Audit and Accounting Guide.

the presence of effective control indicates that LSC funds are being used for the interrelated organization's operations even though the formal accounts may not show this clearly.

A determination as to whether "control" is present such that an organization is actually an interrelated organization, or whether the two organizations are subject to common control, must be based on whether such control in fact exists, considering the totality of the circumstances. It is a factual test, not a numerical one. Thus, the presence or absence of any one or more of these factors is not determinative.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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No. 97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION, ET AL., DEFENDANTS

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**ANSWER**

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Defendant, Legal Services Corporation ("LSC"), by its attorneys, Kronish, Lieb, Weiner & Hellman LLP, answers the Amended Class Action Complaint (the "Complaint") as follows:

1. Denies the allegations in ¶ 1 of the Complaint, except admits that plaintiffs purport to sue on the grounds stated therein and refers the Court to Public Laws 104-134 and 104-208 for their complete contents.

2. Denies the allegations in ¶ 2 of the Complaint, except admits that plaintiffs purport to sue on the grounds stated therein.

3. Denies the allegations in ¶ 3 of the Complaint, except admits that LSC has notified recipients of LSC funding of the requirements of Pub. L. 104-208 and of the recipients' obligation to adhere to those limitations as a condition of continued funding.

4. Denies the allegations in ¶ 4 as they relate to 1995, and denies knowledge and information sufficient to form a belief as to truth of the allegations in ¶ 4 of the Complaint as they relate to 1996.

5. Denies knowledge and information sufficient to form a belief as to truth of the allegations in ¶ 5 of the Complaint, except admits that it has received reports from recipients of LSC funding indicating their compliance with the requirements of Pub. L. 104-208.

6. Denies the allegations in ¶ 6 of the Complaint, except admits that the Complaint purports to invoke the jurisdiction and venue provisions of the statutes cited therein.

7. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 7 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(a) of the Complaint.

(b) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(b) of the Complaint.

(c) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(c) of the Complaint, except admits that MFY Legal Services receives funding from LSC through Legal Services of New York ("LSNY").

(d) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(d) of the Complaint.

(e) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(e) of the Complaint, except admits that Farmworkers Legal Services of New York, Inc. ("FLSNY") has elected to forego LSC funding.

(f) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(f) of the Complaint.

8. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶ 8 of the Complaint, except admits that FLSNY has in the past received funds from LSC, and in 1996, ceased accepting such funds.

9. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 9 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(a) of the Complaint, except admits that Bronx Legal Services receives funding from LSC through LSNY.

(b) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(b) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(c) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(c) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(d) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(d) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(e) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(e) of the Complaint, except admits that Bronx Legal Services receives funding from LSC through LSNY.

(f) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(f) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(g) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(g) of the Complaint.

10. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 10 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶ 10(a) of the Complaint, except admits that Legal Services for the Elderly receives funding from LSC through LSNY.

(b)-(g) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶¶ 10(b)-(g) of the Complaint.

11. Denies the allegations in ¶ 11 of the Complaint to the extent they purport to describe LSC's responsibilities and refers to the Court to the Legal Services Corporation Act of 1974, as amended, for its complete contents, and admits the remaining allegations in ¶ 11 of the Complaint.

12. Denies the allegations in the last sentence in ¶ 12 of the Complaint and states they contain legal conclusions to which no response is required, and denies knowledge and information sufficient to form a belief as to the truth of the remaining allegations in ¶ 12 of the Complaint, except admits that LSNY is a nonprofit corporation which receives funds from LSC and distributes them to grantees.

13. Denies the allegations in ¶ 13 of the Complaint, except admits the plaintiffs identified in ¶ 13 purport to bring this action individually and as a class action.

14. Denies the allegations in ¶ 14 of the Complaint, except admits FLSNY purports to bring this action individually and as a class action.

15. Denies the allegations in ¶ 15 of the Complaint, except admits the plaintiffs identified in ¶ 15 purport to bring this action individually and as a class action.

16. Denies the allegations in ¶ 16 of the Complaint, except admits that the plaintiffs identified in ¶ 16

purport to bring this action individually and as a class action.

17. Denies the allegations in ¶ 17 of the Complaint and states they contain legal conclusions to which no response is required.

18. Denies the allegations in ¶ 18 of the Complaint except admits that Public Law 104-134 was signed into law on April 26, 1996 and states that Public Law 104-208 became effective on October 1, 1996, and refers the Court to these laws for their complete contents.

19. Denies the allegations in ¶ 19 of the Complaint and refers the Court to Public Law 104-134 for its complete contents.

20. Denies the allegations in ¶ 20 of the Complaint except admits that LSC issued rules implementing Public Laws 104-134 and 104-208, and refers the Court to those rules for their complete contents.

21. Denies that any constitutional rights have been impaired and denies knowledge and information sufficient to form a belief as to the truth of the remaining allegations in ¶ 21.

22. Denies the allegations in ¶ 22 of the Complaint.

23. Denies the allegations in ¶ 23 of the Complaint.

24. Denies the allegations in ¶ 24 of the Complaint.

25. Denies the allegations in ¶ 25 of the Complaint.

26. Denies the allegations in ¶ 26 of the Complaint.

27. Denies the allegations in ¶ 27 of the Complaint.

28. Denies the allegations in ¶ 28 of the Complaint.

29. Denies the allegations in ¶ 29 of the Complaint.

30. Denies the allegations in ¶ 30 of the Complaint.

31. Denies the allegation in ¶ 31 of the Complaint.

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches, acquiescence, and/or estoppel.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs lack standing to seek injunctive relief.

Dated: New York, New York
March 19, 1997

KRONISH, LIEB, WEINER & HELLMAN LLP

By: /s/ ALAN LEVINE/BY SAW
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May 22, 1997

**BY HAND DELIVERY**

Honorable Frederic Block
United States District Court,
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez et al. v. Legal Services Corp., et al.,
97 CV 00182 (FB)

Dear Judge Block:

We write on behalf of defendant Legal Services Corporation ("LSC") to advise the Court that, since oral argument in this matter, LSC has made material changes to its regulations concerning "interrelated organizations" and "program integrity." Yesterday, the

revised final regulation was published in the Federal Register. A copy of the regulation, which will supersede the interim regulation that was in effect when the parties briefed and argued plaintiffs' motion for a preliminary injunction, is attached for the Court's convenience. For the reasons set forth below, we believe these changes adequately address the concerns raised by the plaintiffs in this case and the comments received by LSC during the notice and comment period. We are, of course, available to make any additional submission the Court may require on these issues.

As illustrated by the following chart, the "separation" requirements of the final regulation's "program integrity" test are identical to the Department of Health and Human Services' ("HHS") regulation approved by the Supreme Court in *Rust*:

| New LSC Rules (47 C.F.R. 1610.8(a)(3)) | Rules Upheld in Rust (42 C.F.R. 59.9)[1] |
|---|---|
| Factors relevant to this determination [of objective integrity and independence] shall include but will not be limited to: | Factors relevant to this determination [of objective integrity and independence] shall include (but are not limited to): |
| (i) The existence of separate personnel; | (c) The existence of separate personnel; |
| (ii) The existence of separate accounting and timekeeping records; | (a) The existence of separate accounting records; |

[1] The order of subsections has been changed to facilitate comparison.

| | |
|---|---|
| (iii) The degree of separation from facilities in which prohibited activities occur, and the extent of such prohibited activities; and | (b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; and |
| (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present. | (d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. |

The new rule reflects several changes made in response to comments received during the notice period, including the elimination of any distinctions that existed between LSC's and HHS's regulations which were the source of confusion and misinterpretation. For example, LSC eliminated its former test for determining whether two organizations were "interrelated." Under the new rule, the primary issue is whether the non-LSC organization and the LSC grantee satisfy the "program integrity" test approved in *Rust*. Moreover, both the rule and preamble make clear that, like the program integrity test approved in *Rust* the separation factors will be applied on a case-by-case basis, and no one factor is dispositive.

In addition, plaintiffs previously argued that the LSC interim rule was more restrictive than the rule approved in *Rust* because the former required the LSC grantee and the non-LSC entity to have completely separate facilities, while the *Rust* regulations con-

sidered the "degree" of separation between the funded and unfunded facilities. Pl. Reply Br. at 9-10. This issue was also the subject of colloquy during the oral argument on March 24. To eliminate any potential confusion as to this issue, the final LSC rule has been revised to mirror the language in *Rust*; thus, under both rules, the question is the "degree" of separation. (*See above* Table, lines (iii) and (b)).

Finally, plaintiffs argued that the interim rule was overly restrictive because it required that LSC funds not "directly or indirectly" subsidize restricted activities. Pl. Reply Br. at 12. LSC also received comments expressing similar concerns. LSC has revised the rule to require only that LSC funds "do not subsidize restricted activities." 42 CFR 1610.8(a)(2). Moreover, in the preamble to the rule, LSC has clarified that "subsidy" does not include a situation in which a party pays fair market value for a shared facility.

Respectfully yours,

/s/ ALAN LEVINE
ALAN LEVINE

Enclosure

cc: Burt Neuborne, Esq. (by hand)
Peter M. Fishbein, Esq. (by hand)
Jeffrey S. Markowitz, Esq. (by telecopier)

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September 22, 1997

**VIA HAND DELIVERY**

The Honorable Frederic Block
United States District Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Velazquez, et al. v. Legal Services Corporation, et al., 97 CV 182 (FB)

Your Honor:

I am writing to call to your attention an important event affecting plaintiffs' motion for a preliminary injunction, dated January 27, 1997, pending before Your Honor.

On August 12, 1997, Legal Services for New York City ("LSNY") (previously voluntarily dismissed as a defendant, without prejudice, from this action) submitted to defendant Legal Services Corporation ("LSC") a proposed plan of operation for an affiliate corporation of Queens Legal Services Corporation ("QLSC") (a recipient of LSC funding, but a non-party to this action) pursuant to 45 C.F.R. 1610.[1] Under the proposed plan, the affiliate, utilizing non-LSC funds, would engage in activities prohibited to recipients of LSC funds. By letter dated September 10, 1997 to LSNY, John A. Tull, Director of LSC's Office of Program Operations, concluded that the proposed plan does not satisfy the "objective integrity and independence required by 45 C.F.R. 1610.8 from organizations that engage in restricted activities."[2]

One of LSC's arguments in opposition to plaintiffs' motion was that the motion was "premature," and, as a "facial" challenge to the statute and regulations at issue, must be denied if there were any conceivable constitutional interpretation of them. At the March 24 oral argument on plaintiffs' motion, counsel for LSC argued that LSC "ought to be put to the test of interpreting their regulations with respect to their grantees, to show whether or not this is as treacherous as Your Honor is suggesting." (Transcript at 18-19.) *See also* Defendants' Supplemental Memorandum of Law, dated March 21, 1997, at 3-4. LSC has now promulgated a definitive interpretation of its regulations which can be

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[1] A copy of the Request for Approval of Non-LSC Affiliate Relationship is attached as Exhibit A hereto.

[2] A copy of Mr. Tull's September 10, 1997 letter is attached as Exhibit B hereto.

adjudicated as a concrete case rather than a facial challenge.[3]

Moreover, the interpretation of the regulations as reflected in the rejection of QLSC's proposed plan, is plainly unconstitutional. QLSC's proposed plan makes clear that "QLSC-II [the affiliated entity] will not receive any LSC funds through any source. In addition, careful accounting and apportionment of expenses will ensure that the non-subsidization requirement of § 1610.8(a)(2) is met." Through the maintenance of "complete and accurate time records" all salaries and expenses will be allocated to ensure that only non-LSC funds subsidize restricted activity.

Mr. Tull's letter does not challenge the efficacy of these accounting procedures, and LSC's rejection of the proposal is not based on the position that in fact LSC funds will subsidize restricted activities. Rather, the basis for LSC's rejection is solely that, even though there will be no actual subsidy, there would be "confusion and misunderstanding about QLSC's involvement with restricted activities." In other words, the proposal is rejected because it would create the perception—even though untrue—that LSC funds were subsidizing restricted activity. Thus, Mr. Tull's letter states that the "bookkeeping separation between the organizations [i.e., the accounting procedures which would insure no subsidy in fact] is insufficient to avoid the public perception that restricted activities are being conducted by QLSC staff out of QLSC offices."

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[3] Although QLSC is not a party, LSC's interpretation obviously affects the rights of the named plaintiffs.

There are two reasons why this application of the regulations should be enjoined. First, it is factually incorrect. The proposal makes clear that in every instance where an attorney is representing QLSC-II in performing restricted services, that activity will be clearly identified by letterhead, litigation backs, oral statements and other appropriate means as being conducted by an entity which is not funded in any way by LSC. Since the restricted activities are actions to be taken before a court, administrative agency or legislative body, such identification is clearly sufficient to avoid any public perception that LSC funds are being used. (See my letter to the court dated June 5, 1997, pp. 2-3).[4]

Second, since there is no subsidy in fact, the possibility of a public perception to the contrary cannot justify the government prohibiting plaintiffs from engaging in constitutionally protected activities. Unlike the Title X program at issue in *Rust*, where concern was raised that a medial counselor may be "perceived" as acting as the government's "mouthpiece" for restricted activity (*i.e.*, abortion counseling), the attorneys in the instant case are often adverse to the government, and their activity, reaching the "heart" of the First Amendment, cannot be restricted. See Plaintiffs' Reply Memorandum of Law, dated March 21, 1997, at 2-7.

---

[4] LSC's concern that under the QLSC proposed plan the "corporations share what is essentially the same name (*i.e.*, QLSC and QLSC-II)" can be readily addressed by QLSC-II adding to any papers filed, business cards (and/or signage) the parenthetical "(non-LSC funded)", or the name of the affiliated entity can be changed.

Oral argument on plaintiffs' January 27, 1997 preiminary injunction motion was held on March 24, 1997. In the meantime, final new regulations have been approved and a proposed plan for creating an affiliate entity has been concretely rejected by LSC pursuant to 45 C.F.R. 1610. Indeed, other legal service fund recipients are ready, willing and able to establish similar affiliate entities to service the indigent individuals who so desperately require legal representation to vindicate their rights in court. Plaintiffs, as well as such entities and other individuals, eagerly await this Court's decision.

Respectfully,

/s/ PETER M. FISHBEIN
PETER M. FISHBEIN

cc: Alan Levine, Esq. (via hand delivery)
Jeffrey S. Markowitz, Esq.
(via facsimile and federal express)

[Exhibit A to Sept. 22, 1997 letter
from Fishbein to court]

REQUEST FOR APPROVAL OF
NON-LSC AFFILIATE RELATIONSHIP

**I. Background**

Queens Legal Services Corporation ("QLSC"), a not-for-profit corporation organized under the laws of the State of New York, and a provider of legal services for the poor in the County of Queens, New York, hereby applies to Legal Services Corporation ("LSC") for approval of the affiliation of QLSC with a second corporation, Queens Legal Services Corporation II ("QLSC-II"), a not-for-profit corporation organized under the laws of the State of New York, which will use non-LSC funds to provide legal services restricted by Pub. L. 104-208.

In order to represent clients to the fullest extent permitted under the Constitution and in accordance with LSC regulations, QLSC has established a separate affiliated corporation for the purpose of engaging in restricted activities without the use of LSC funds. On May 7, 1997 the Board of Directors of QLSC adopted a resolution creating QLSC-II to engage in such activity. QLSC-II has been incorporated, has sources of non-LSC funding and is ready to commence operations immediately. Therefore, pursuant to LSC's policy of reviewing contemplated relationships upon request, as stated in 62 Fed. Reg. 27695, 27698 (May 21, 1997), QLSC hereby seeks confirmation from LSC that this proposed affiliate structure, as set forth below, com-

plies with the regulations set forth in 45 C.F.R. Part 1610 and any other applicable LSC regulations.

**II. Operations**

QLSC proposes the following operating arrangements with QLSC-II, so as to permit QLSC to continue to receive LSC funding and to permit QLSC-II to engage in legal services activities otherwise restricted under Pub. L. 104-208, without reducing QLSC's eligibility for LSC funding. QLSC will continue to receive LSC funds (either directly or through Legal Services for New York City, Inc.) and will not use those funds for legal services activities restricted by Pub. L. 104-208. QLSC-II will receive funds only from sources other than LSC; these sources may include, among others, IOLA, state and local governments, foundations and private donors. QLSC-II also may receive such non-LSC funds through QLSC. QLSC will not engage in any activity restricted by Pub. L. 104-208, while QLSC-II will engage in such activities, and may also engage in non-restricted activities. QLSC and QLSC-II will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including, but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

**A. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(1) because the two organizations are legally separate entities.**

The proposed relationship complies with the requirements of § 1610.8(a)(1) because, as indicated above, QLSC-II is a legally separate entity from QLSC.

**B. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(2) because QLSC-II will receive no transfer of LSC funds, and LSC funds will not subsidize restricted activities.**

As indicated above, QLSC-II will not receive any LSC funds through any source. In addition, careful accounting and apportionment of expenses will ensure that the non-subsidization requirement of § 1610.8(a)(2) is met. In the case of shared attorneys and paralegals, each entity will pay the proportion of salaries and benefits that are allocable to that entity, which will be calculated retrospectively on a monthly basis, based on time spent by the employee working for that entity. All other common or shared financial expenditures, including salaries of non-legal personnel, rent, library expenses, phone bills, utilities, supplies and office equipment expenses will be divided between QLSC and QLSC-II on a pro-rata basis (the "pro-rata figure"). The "pro-rata figure" will be calculated, retrospectively, on a monthly basis, as a ratio between attorney and paralegal time spent on QLSC matters and QLSC-II matters.

Each attorney and paralegal at QLSC and QLSC-II will maintain complete and accurate time records of the work they perform for each corporation. At the end of

each fiscal year, beginning upon the date of this application, the pro-rata figure will be calculated from these time records and all common and shared expenses and costs for QLSC and QLSC-II will be divided in accordance with that figure. This will ensure that for each fiscal year, LSC funds do not subsidize activities restricted by Pub. L. 104-208.

**C. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(3) because QLSC will be physically and financially separate from QLSC-II.**

In compliance with § 1610.8(a)(3), QLSC and QLSC-II will maintain sufficient physical and financial separation to ensure that QLSC is not identified with restricted activities. Although QLSC and QLSC-II may share a common reception area, the separate corporations will be distinguishable through signage stating: "Queens Legal Services Corporation" and "Queens Legal Services Corporation II." Once an attorney meeting with a potential client foresees the reasonable likelihood that an activity restricted by Pub. L. 104-208 may be undertaken, the attorney shall advise the potential client that their matter will be handled by the non-LSC funded QLSC-II. If the attorney is only employed by QLSC, the attorney shall direct the client to a QLSC-II attorney.

In addition, there will be clear identification of the entity that is acting in any given case, through the use of separate and distinct business cards, letterhead, litigation backs and other means of identification. For example, any court filing will be made with a litigation back indicating which entity is filing the document. Similarly, at all court appearances, depositions or meet-

ings with opposing counsel or other parties, similar identification will be presented. Finally, if any attorney wishes to engage in lobbying efforts or administrative or legislative activity restricted by Pub. L. 104-208, the attorney shall identify himself or herself as an employee of "Queens Legal Services Corporation II" and present a business card or other identification to that effect.

These procedures provide for physical and financial separation as required by 45 C.F.R. § 1610.8(a)(3). The activities restricted by Pub. L. 104-208 essentially involve representation of clients in judicial or administrative proceedings or appearances before legislative bodies. Thus, the proposed procedures—which require that every paper filed and every appearance by an attorney involving a restricted activity will identify that the client is being represented by QLSC-II, not QLSC—are entirely sufficient in themselves to ensure that QLSC is not identified with the restricted activity. It will be apparent to the courts and agencies before which QLSC-II practices, the legislative bodies before which it appears, its clients and the public that QLSC is not engaging in, financing or endorsing the activities of QLSC-II.

[Exhibit B to Sept. 22, 1997 letter
from Fishbein to court]

[Emblem omitted]
LEGAL SERVICES CORPORATION
750 1st St., NE, 11th FL, Washington, D.C. 20002-4250
(202) 336-8800 Fax (202) 336-8959

[other letterhead material omitted]

September 10, 1997

H. Richard Schumacher, Esq.
Chairperson, Board of Directors
Legal Services for New York City
350 Broadway, 6th Floor
New York, NY 10013-9998

Re: Recipient No. 233100

Dear Mr. Schumacher:

I am writing in response to your letter of August 12, 1997, presenting a proposed plan of operation for an affiliate corporation of your subgrantee Queens Legal Services Corporation. I appreciate your interest in determining whether such an arrangement would be permissible under 45 C.F.R. 1610. For the reasons that follow, we conclude that the plan does not meet the requirements of the regulation.

As you know, 45 C.F.R. 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC-funded entity shall engage in restricted activity.[1] Under this regulation, an LSC recipient cannot itself engage in such activities, transfer LSC funds to another organization which engages in restricted activity, or use LSC funds to subsidize the restricted activity of another organization.

Recipients may transfer *non*-LSC funds to another organization which engages in restricted activity if, and only if, the other organization is a legally separate entity and the LSC recipient maintains objective integrity and independence from it.

To meet the objective integrity and independence test, a recipient must be organized so it is *physically and financially separate* from the other organization. Mere bookkeeping separation is insufficient. To determine whether there is sufficient physical and financial separation, the following factors, among others, will be considered:

- existence of separate personnel;
- existence of separate accounting and timekeeping records;
- degree of separation from facilities in which restricted activities occur, and the extent of such activities; and

---

[1] A list of the restricted activities can be found at 45 C.F.R. 1610.2(a) and (b). They include, among other things, lobbying, participation in class actions, representation of prisoners, and claiming, or collecting and retaining attorneys' fees.

- the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

The presence or absence of any one or more factors is not determinative. Each situation is viewed on a case-by-case, totality of the circumstances basis.

The Queens proposal clearly fails this test. Although Queens Legal Services Corporation II ("QLSC-II") is a legally separate entity from Queens Legal Services Corporation ("QLSC"), that is practically all that is separate. As the proposal states, not only will the corporations share what is essentially the same name, but QLSC and QLSC-II also

> will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

The corporations will share a common reception area, and it appears that clients will be directed to common offices for appointments with attorneys who work for both corporations. The method of apportioning expenses retrospectively (monthly in some instances, at the end of the fiscal year in others) indicates common financial and timekeeping systems as well.

The fact that there may be separate signs, business cards, letterhead, litigation backup and other means of

identification does not satisfy the separateness requirement. As proposed, the two corporations are so completely intertwined that identification of QLSC and QLSC-II's restricted activities would be inevitable, as would confusion and misunderstanding about QLSC's involvement with restricted activities. What amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by QLSC staff out of QLSC offices. Under such circumstances, QLSC does not have the requisite objective integrity and independence required by 45 C.F.R. 1610.8 from organizations that engage in restricted activities.

I hope this letter provides you with the guidance you need. If you have further questions, feel free to contact Anh Tu at (202) 336-8946.

Sincerely,

/s/ JOHN A. TULL
JOHN A. TULL, Director
Office of Program Operations

cc: Dale Steven Johnson, Esq.
Joseph Farber, Esq.
Arnold S. Cohen, Esq.

[seal omitted]

U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883, Room 1012
Washington, D.C. 20044

Tel: (202) 514-3486
Fax: (202) 616-8202

September 25, 1997

**VIA OVERNIGHT DELIVERY**

Hon. Frederic Block
United States District Judge
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Carmen Velazquez, et al. v. Legal Services Corporation, et al., USDC E.D.N.Y., Civil Action No. CV 97 00182 (FB)

Your Honor:

In Peter M. Fishbein's letter of September 22, 1997, he discusses an event unrelated to the above-referenced lawsuit affecting an entity which is not a party to the lawsuit. I write to make a single point:

Nothing in Mr. Fishbein's letter affects or alters the inquiry before the Court.

Plaintiffs' challenge to the restrictions on Legal Services Corporation ("LSC") funds continues to be a *facial* challenge. Accordingly, plaintiffs' burden remains to demonstrate that there are not circumstances under which the restrictions could be applied without infringing constitutional rights. Mr. Fishbein's letter does not address that burden.

If the non-party entity to which Mr. Fishbein refers, which appears to have made no effort to comply with the physical separation requirements of the LSC regulations, disagrees with LSC's determination, it has a number of options available to it. Those options include bringing an as applied challenge in an appropriate forum.

Respectfully submitted,

/s/ JEFFREY S. MARKOWITZ
JEFFREY S. MARKOWITZ
Trial Attorney

cc: Alan Levine
Peter M. Fishbein
Burt Neuborne

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September 26, 1997

**BY HAND DELIVERY**

Honorable Frederic Block
United States District Court,
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez et al. v. Legal Services Corp., et al.,
97 CV 00182 (FB)

Dear Judge Block:

We write on behalf of defendant Legal Services Corporation ("LSC") to respond to plaintiffs' letter to the Court dated September 22, 1997.

Plaintiffs mistakenly believe that LSC's disapproval under its program integrity regulations of a proposal

for a non-LSC funded entity to engage in restricted activities using the same personnel, offices and support services as an LSC funded entity advances their position in this case. To the contrary, plaintiffs' attempt to inject this proposal into this case (a) reflects their refusal to come to grips with the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 171, 188 (1991), that the desire to "avoid creating the appearance that the Government is supporting" activities Congress decided not to support is a valid one and (b) completely ignores the principle underlying the regulations, *i.e.*, that mere bookkeeping separation is insufficient to insure that the two entities have the requisite "objective integrity and independence." 45 C.F.R. § 1610.8.

As explained in greater detail by Mr. Tull in his letter to LSNY, no attempt whatsoever was made to address the concerns reflected in the regulations. The two entities would work out of the same offices. They would share Project Directors, attorneys, paralegals, secretaries and other staff. They would use the same facilities and office support services. Indeed, even the choice of names (Queens Legal Services Corporation and Queens Legal Services Corporation II) underscores the near-identity of the two units. With the two entities sharing *everything*, the identification of an LSC funded entity with restricted activities would be unavoidable and their independence virtually non-existent. This is precisely what the program integrity requirements here, like the identical ones approved in *Rust*, were designed to prevent.

We also note that LSNY is not a plaintiff in this action. The fact remains that no plaintiff has attempted to comply with the program integrity regulations. The Court is thus still presented with a facial challenge to LSC's regulations, and therefore, to be entitled to relief, plaintiffs must establish that there is no set of facts under which the regulations could be applied in a constitutional manner. For the reasons set forth in our previous submissions, plaintiffs cannot meet this burden, and their request for a preliminary injunction should be denied.

Respectfully yours,

/s/ ALAN LEVINE
ALAN LEVINE

cc: Burt Neuborne, Esq. (by hand)
Peter M. Fishbein, Esq. (by hand)
Jeffrey S. Markowitz, Esq. (by telecopier)

Supreme Court, U.S.
FILED
JUN 13 2000
CLERK

Nos. 99-603 and 99-960

# In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

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72 AP

## QUESTION PRESENTED

Section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-53, and subsequent appropriations statutes incorporating that provision, preclude entities that receive federal funds from the Legal Services Corporation (LSC) from "initiat[ing] legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." § 504(a)(16), 110 Stat. 1321-55. Section 504(a)(16) specifies that the provision should not be construed, however, "to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." *Ibid.*

The question presented is whether the statutory provision permitting recipients of LSC funds to represent individuals seeking relief from a welfare agency only if the relief sought would not amend or change existing law is facially invalid under the First Amendment.

## PARTIES TO THE PROCEEDING

The United States intervened in the district court, was intervenor-appellee in the court of appeals, and is petitioner in *United States* v. *Velazquez*, No. 99-960. The Legal Services Corporation was a defendant in the district court, was appellee in the court of appeals, and is petitioner in *Legal Services Corp.* v. *Velazquez*, No. 99-603. The Court granted the petitions for a writ of certiorari in the two cases at the same time and consolidated the cases. 120 S. Ct. 1553 (2000).

The following parties were plaintiffs in the district court, were appellants in the court of appeals, and are respondents before this Court in both cases: Carmen Velazquez; WEP Workers Together!; Community Service Society of New York, Inc.; New York City Coalition to End Lead Poisoning; Centro Independiente de Trabajadores Agricolas, Inc.; Greater New York Labor-Religion Coalition; Farmworkers Legal Services of New York, Inc.; Peggy Earisman; Olive Karen Stamm; Jeanette Zelhof; Elisabeth Benjamin; Jill Ann Boskey; Lauren Shapiro; Andrew J. Connick; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clayton Powell, Jr. IV; Lawrence Seabrook; and Scott M. Stringer.

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# In the Supreme Court of the United States

No. 99-603

LEGAL SERVICES CORPORATION, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

No. 99-960

UNITED STATES OF AMERICA, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a)[1] is reported at 164 F.3d 757. The opinion of the district court (Pet. App. 51a-99a) is reported at 985 F. Supp. 323.

### JURISDICTION

The judgment of the court of appeals was entered on January 7, 1999. A petition for rehearing was denied on

[1] Pet. App. refers to the appendix to the petition for a writ of certiorari in *United States* v. *Velazquez*, No. 99-960.

July 8, 1999. The Legal Services Corporation filed a petition for a writ of certiorari on October 6, 1999. *Legal Servs. Corp.* v. *Velazquez*, No. 99-603. On September 28, 1999, Justice Ginsburg extended the time for the United States to file a petition for a writ of certiorari to and including November 5, 1999, and, on October 27, 1999, further extended the time to and including December 5, 1999 (a Sunday). The United States filed a petition for a writ of certiorari on December 6, 1999 (No. 99-960). On April 3, 2000, the Court granted the petitions for a writ of certiorari and consolidated the cases. 120 S. Ct. 1553. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-53, is set forth in relevant part at App., *infra*, 1a-9a.

The provisions in subsequent annual appropriations acts specifying that Section 504 shall continue to apply to recipients of funds from the Legal Services Corporation are set forth in relevant part at App., *infra*, 18a-25a.

3. The regulations promulgated by the Legal Services Corporation regarding program integrity requirements for its fund recipients and the implementation of

Section 504(a)(16), 45 C.F.R. 1610.8, 1639.1-1639.6, are set forth at App., *infra*, 26a- 30a.

## STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation Act (the LSC Act), Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. 2996 *et seq.*, creating the Legal Services Corporation (LSC) as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. 2996e(a)(1)(A). The Act authorizes LSC to make grants to, and to contract with, individuals, organizations, and (in certain limited circumstances) state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* LSC receives funds appropriated annually by Congress to provide such financial assistance. LSC then distributes those funds to programs, individuals, and other entities that have submitted applications describing their proposed legal services activities. 42 U.S.C. 2996b(a), 2996e(a). The LSC Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 42 U.S.C. 2996b(a).

From the outset, the LSC Act has prohibited fund recipients from, *inter alia*, making available any LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U.S.C. 2996e(d)(3) and (4). The LSC Act also has prohibited the use of LSC funds to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 42 U.S.C. 2996f(a)(5). And the LSC Act has prohibited the use of LSC funds to provide legal assistance with

regard to any proceedings relating to any nontherapeutic abortion, elementary or secondary school desegregation, military desertion, or violation of the selective service statute. 42 U.S.C. 2996f(b)(8)-(10) (1994 & Supp. III 1997). Finally, the LSC Act has, from the outset, prohibited LSC fund recipients from bringing any class action suits directly, or through others, unless express approval is obtained from the recipient's project director according to established policies. 42 U.S.C. 2996e(d)(5). Those restrictions in the LSC Act apply to recipients' activities supported by other federal funds or private funds, but not those supported by non-federal public funds or tribal funds. 42 U.S.C. 2996i(c).[2]

b. On April 26, 1996, at a time when proposals were before Congress to eliminate LSC because of controversy over certain activities pursued by some LSC fund recipients, Congress enacted a provision (Section 504) that expanded the scope of restrictions on the activities of LSC fund recipients. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), Pub. L. No. 104-134, § 504, 110 Stat. 1321-53. In each subsequent annual appropriations act, Congress has specified that Section 504 shall continue to apply to LSC fund recipients.[3]

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[2] The LSC Act vests LSC with the authority "to insure the compliance of recipients and their employees with the provisions of [the LSC Act] and the rules, regulations, and guidelines promulgated pursuant to [the LSC Act], and to terminate, after a hearing * * *, financial support to a recipient which fails to comply." 42 U.S.C. 2996e(b)(1)(A). The LSC Act also authorizes LSC to "issue rules and regulations to provide for the enforcement" of that and other requirements of the Act. 42 U.S.C. 2996e(b)(5); see also 42 U.S.C. 2996g(e).

[3] See Omnibus Consolidated Appropriations Act, 1997 (1997 Act), Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59; Departments

Section 504 precludes LSC fund recipients from representing certain parties in a variety of specified circumstances. Under Section 504(a)(16), which is at issue here, recipients may not "initiate[] legal representation or participate[] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." 1996 Act, § 504(a)(16), 110 Stat. 1321-55. That section further specifies, however, that it "shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." § 504(a)(16), 110 Stat. 1321-55 to 1321-56.

Other restrictions set forth in Section 504 provide, *inter alia*, that LSC fund recipients may not: advocate or oppose reapportionment of a legislative, judicial, or elective district, or participate in any litigation related thereto; attempt to influence the "issuance, amendment, or revocation of any executive order, regulation," or similar government promulgation; attempt "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" that is formulating general agency policy; attempt to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of the Congress or a State or local legislative body"; initiate or participate in class-action lawsuits; represent aliens who are

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of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a), 111 Stat. 2510; Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Tit. V, 112 Stat. 2681-107; Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, 113 Stat. 1501A-49.

unlawfully present in the United States except in cases of domestic violence; conduct a training program "for the purpose of advocating a particular public policy or encouraging a political activity"; participate "in any litigation with respect to abortion"; "participate[] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison"; or defend a person in a proceeding to evict the person from a public housing project if the person has been charged with engaging in illegal drug activity that threatens the health or safety of a tenant or employee of the housing agency. 1996 Act, § 504(a)(1), (2), (3), (4), (7), (11), (12), (14), (15) and (17); 110 Stat. 1321-53 to 1321-56; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60. Those restrictions apply to all of the activities of an LSC fund recipient, including those paid for by non-LSC funds (except for tribal funds). 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56.[4]

2. On December 2, 1996, LSC issued a final rule to "clarif[y] the extent to which conditions on a recipient's non-LSC funds apply when a recipient transfers its funds to another person or entity." 61 Fed. Reg. 63,749.[5] LSC noted that the statutes do not themselves address

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[4] LSC fund recipients may, however, use non-LSC funds "to comment on public rulemaking or to respond to [an unsolicited] written request for information or testimony from a Federal, State or local agency, legislative body, or committee," 1996 Act, § 504(e), 110 Stat. 1321-57, and "for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient," 1996 Act, § 504(b), 110 Stat. 1321-56.

[5] LSC had published an interim rule on August 16, 1996, concerning that and other aspects of the restrictions. 61 Fed. Reg. 41,960.

how and to what extent the restrictions they impose should be applied with respect to funds that are transferred by a recipient to another entity. LSC explained, however, that it "has historically applied such provisions to transfers of a recipient's funds," and that that "policy reflects the intent of [LSC] that transfers of funds not become a means to circumvent statutory conditions on a recipient's LSC and non-LSC funds." *Id.* at 63,752.

The final rule differentiated between the transfer of LSC and non-LSC funds. With respect to transfers of LSC funds, the rule specified that the Section 504 prohibitions and requirements would generally "apply to both the LSC funds and the non-LSC funds of the entity" to which LSC funds were transferred. LSC explained that

> [t]his requirement is based on [LSC's] interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

61 Fed. Reg. at 63,752. In the case of a transfer of *non*-LSC funds, the prohibitions and requirements on the use of funds generally applied "to the funds transferred, but * * * not * * * to the other non-LSC funds" of the transferee. *Id.* at 63,753.

Another issue that LSC had to resolve was whether, and to what extent, the statutes' restrictions should apply to organizations that are "interrelated" with an LSC fund recipient. LSC made clear that the new restrictions on the use of LSC and non-LSC funds apply

to any "interrelated" organization just as if it were the recipient itself. J.A. 66-67. LSC previously had defined the term "interrelated organization" as an organization for which the LSC fund recipient determined "the direction of management and policies" or influenced the organization "to the extent that an arm's length transaction may not be achieved." 50 Fed. Reg. 49,279 (1985).

3. a. In January, 1997, a suit was brought against LSC in the United States District Court for the District of Hawaii. The plaintiffs contended, *inter alia*, that the 1996 and 1997 Acts and the implementing regulations were facially invalid under the First and Fifth Amendments to the extent they prevented LSC fund recipients from spending non-federal funds to pursue activities protected by the First Amendment. See *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (*LASH I*).

On February 14, 1997, the district court in *LASH I* entered a preliminary injunction against enforcement of certain of the restrictions, including Section 504(a)(16). It reasoned that Congress may restrict the use of funds in conjunction with a federally subsidized program only if adequate alternative channels exist whereby the grant recipients can pursue the unsubsidized activities. *LASH I*, 961 F. Supp. at 1408, 1412-1414 (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983)). The *LASH I* district court found that there was a fair likelihood that the plaintiffs could establish that LSC's regulations, and in particular LSC's interrelated-organization standard (see pp. 7-8, *supra*), did not allow a recipient to form an affiliate organization through which it could pursue restricted activities using non-LSC funds and,

therefore, did not provide alternative channels through which recipients could exercise their First Amendment rights. *Id.* at 1414-1417.

b. On March 14, 1997, following the decision in *LASH I*, LSC issued a new interim rule concerning the use of non-LSC funds by LSC fund recipients. 62 Fed. Reg. 12,101-12,104. The revisions were intended to "reinforce [LSC's] commitment to the statutory structure of prohibitions and restrictions intended by Congress, without risking the possible infringement of constitutional rights where the prohibited activities are supported entirely by non-LSC funds and carried out without subsidization by the LSC grantee." *Id.* at 12,101. LSC explained that the court's preliminary injunction in *LASH I* "was grounded in pertinent part on its understanding of [LSC's] interrelated organization policy." *Ibid.* In an effort to address the alleged constitutional infirmities, the new interim rule deleted the provisions on transfers of non-LSC funds and added a new section allowing LSC fund recipients "to have an affiliation or relationship" with a separate organization that engages in restricted activities with non-LSC funds so long as the relationship meets new standards of program integrity, even if the recipient and organization are interrelated—*i.e.*, even if the recipient controls, is controlled by, or shares common control with the other organization. *Id.* at 12,101-12,102.

c. On May 21, 1997, after receiving comments, LSC issued a new final rule. 62 Fed. Reg. 27,695. LSC noted that parts of its 1996 final rule remained unchanged, including the provision that, when a recipient transfers LSC funds, the restrictions regarding the use of funds generally apply both to the transferred LSC funds and to the non-LSC funds of the transferee. *Id.* at 27,696-27,697; see 61 Fed. Reg. at 63,752. At the same time,

however, LSC confirmed its deletion (as set forth in the March 14, 1997, interim rule) of the provision concerning an LSC fund recipient's transfer of *non*-LSC funds, noting that "[t]here is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions." 62 Fed. Reg. 27,697.

The new final rule revised the program-integrity standards to delete entirely the provisions regarding interrelated organizations and to provide "guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities." 62 Fed. Reg. at 27,697. The new final rule provides that an LSC fund recipient must have an objective integrity and independence from any organization that engages in restricted activities, and in particular that three requirements must be satisfied: (1) the other organization must be a separate legal entity; (2) the other organization must not receive LSC funds directly or through any transfer, and no LSC funds may subsidize restricted activities; and (3) the LSC fund recipient must maintain a physical and financial separation from the other organization. The last factor is to be applied based on the totality of circumstances, including the existence of separate personnel, accounting and timekeeping records, the degree of separation of facilities, and the extent to which the entities are distinguished from each other by signs or other indicia. *Id.* at 27,698, 27,700; 45 C.F.R. 1610.8(a)(3)(i)-(iv). LSC noted that "because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards." 62 Fed. Reg. at 27,697. LSC noted that the program-integrity standards were fashioned after those found to be constitutional in *Rust*

v. *Sullivan*, 500 U.S. 173 (1991). 62 Fed. Reg. at 27,697.[6]

d. On June 5, 1997, LSC adopted final regulations clarifying the provisions of Section 504(a)(16). 62 Fed. Reg. 30,766. The regulations interpreted the statutory phrase "an effort to reform a Federal or State welfare system," to include "all of the provisions, except for the Child Support Enforcement provisions of Title III, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, * * * 110 Stat. 2105 (1996), and subsequent legislation enacted by Congress or the States to implement, replace or modify key components" of that Act, and legislation enacted "by States to replace or modify key components of their General Assistance or similar means-tested programs." 45 C.F.R. 1639.2(a); see App., *infra*, 28a. In addition, the regulations defined the statutory term "existing law" to

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[6] LSC rejected arguments that separate bookkeeping should be sufficient for there to be a permissible relationship between a recipient and an organization that engages in restricted activities because LSC explained that "such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities." 62 Fed. Reg. at 27,698. Rather, "determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities." *Ibid.*; see also *id.* at 12,102.

LSC also emphasized that, "consistent with [LSC's] longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant 'program integrity' information and request a review by [LSC] of any existing or contemplated relationship with an organization that engages in restricted activities." 62 Fed. Reg. at 27,698.

mean "Federal, State or local statutory laws or ordinances which are enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto." 62 Fed. Reg. at 30,766; 45 C.F.R. 1639.2(b).

4. Respondents filed the instant suit in the United States District Court for the Eastern District of New York on January 14, 1997. Respondents are certain lawyers employed by LSC fund recipients, their indigent clients, and various contributors to LSC fund recipients. They alleged that the restrictions on the use of LSC and non-LSC funds by LSC fund recipients violated a variety of federal constitutional provisions. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the restrictions. C.A. App. 437, 504.

On March 21, 1997 (before the new final rule was issued by LSC on May 27, 1997), respondents moved for class certification and a preliminary injunction, seeking to prevent LSC from imposing any sanctions on anyone based on the use of non-LSC funds by LSC fund recipients to engage in certain activities, including "to challenge the constitutionality of welfare statutes" or "to challenge the legality of welfare regulations or statutes." C.A. App. 129-130. On December 22, 1997 (after LSC issued its new final rule), the district court denied respondents' motion for a preliminary injunction.[7] The court concluded that respondents had failed

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[7] On August 1, 1997, the district court in the *LASH* litigation entered an order granting summary judgment to LSC and the United States. *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 981 F. Supp. 1288, 1301 (D. Haw.) (*LASH II*). On May 18, 1998, the Ninth Circuit affirmed in relevant part. *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998).

to establish a probability of success on the merits. Pet. App. 53a-54a. The court held, following *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that LSC's final regulations leave open adequate alternative channels through which LSC fund recipients may engage in otherwise prohibited activities, because the regulations allow recipients to create and control affiliate organizations that engage in such activities. The court found that LSC's regulations requiring separation between LSC fund recipients and their affiliates are consistent with the statutory funding restrictions, Pet. App. 83a-88a, and that LSC's program-integrity requirements are appropriately tailored to serve the government's interest in preventing the appearance that the government is endorsing activities that Congress does not wish to fund. *Id.* at 88a-94a.

Respondents sought to distinguish *Rust* (which concerned regulations that precluded programs receiving federal funding for family-planning services from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning) on the grounds that *Rust* did not involve a lawyer-client relationship. Pet. App. 95a-98a. The court rejected that argument because, while the lawyer-client relationship implicates First Amendment values, "the restrictions pertaining to LSC fund recipients do not significantly impinge on the lawyer-client relationship." *Id.* at 97a. The court noted in this regard that the LSC regulations "broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer

from engaging in the activity the client may wish to undertake." *Id.* at 98a.[8]

5. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-50a.

a. The court first rejected respondents' argument that LSC's final regulations (allowing recipients to create affiliated organizations to engage in activities that are prohibited to recipients or transferees of LSC funds) are not based on a reasonable interpretation of the 1996 Act and that, without the regulations, the statutory provisions are unconstitutional because they do not leave open adequate alternative channels for expressive activities. See Pet. App. 12a-14a. The court noted that LSC's regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court then emphasized that the 1996 Act does not address whether a recipient's transfer of non-LSC funds to an affiliate and the affiliate's use of those funds for a restricted activity constitutes an expenditure by a recipient under the Act. Pet. App. 13a-14a. The court concluded that LSC's final regulations allowing such arrangements

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[8] The district court rejected respondents' "rather casual due process and equal protection claims." Pet. App. 98a. The due process claim failed "for the same reasons the analogous claim failed in *Rust* – namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." *Ibid.* The equal protection claim failed because "the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification." *Ibid.*

rest on a permissible construction of the Act and, therefore, are valid under *Chevron*. *Id.* at 12a-14a.[9]

The court also held that LSC's program-integrity regulations, which are designed to ensure the independence of an affiliated organization from the LSC fund recipient, do not impose "unconstitutional conditions" on the recipient of LSC funds by unreasonably burdening a recipient's use of nonfederal funds to engage in activity protected by the First Amendment. Pet. App. 17a-23a. The court found that the existence of adequate alternative avenues for engaging in restricted activities through affiliates is sufficient to satisfy First Amendment scrutiny. *Id.* at 17a-21a (discussing *Taxation With Representation*, *League of Women Voters*, and *Rust*). The court further held that respondents' allegations that the program-integrity regulations are unduly burdensome and inadequately justified were insufficient to sustain their facial challenge to those regulations. *Id.* at 22a-23a. The court noted, however, that LSC fund recipients remain free to bring as-applied challenges to the program-integrity rules. *Id.* at 23a.

The court rejected respondents' claim that certain restrictions on the use of non-LSC funds, including the welfare reform provision, impermissibly encroach on the relationship between lawyer and client. Pet. App. 15a-17a. The court pointed out that this Court had observed in *Rust* that "[i]t could be argued * * * that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when

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[9] The court also expressed reluctance to accept respondents' statutory interpretation because of "the rule favoring an interpretation of a statute that preserves its constitutionality." Pet. App. 14a.

subsidized by the Government." *Id.* at 15a (quoting *Rust*, 500 U.S. at 200). The Court in *Rust* did not address that argument, however, because it found that the doctor-patient relationship established under the program at issue was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Ibid.* Similarly here, the court of appeals reasoned that, even assuming "that an 'all-encompassing' lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships * * * which were considered in *Rust*." *Id.* at 16a. The court of appeals noted that the LSC Act has always limited the range of services available through LSC grantees (see pp. 3-4, *supra*) and that grantees have historically limited their representation to selected issues and are "typically 'able to meet only a fraction of the demand for their services.'" *Ibid.* (quoting *Overview of LSC* at 4 (1996) (http://Hsi.nes/lsc/about.html)). The court also noted that because LSC-funded lawyers are bound to explain the restrictions to potential and actual clients, and are able to refer clients to lawyers who are not subject to such restrictions, there is no reason to fear that clients will detrimentally rely on LSC-funded lawyers for a full range of legal services. *Ibid.*

The court of appeals rejected respondents' claims of impermissible viewpoint discrimination with respect to the general restrictions on lobbying of legislative bodies (§ 504(a)(4), 110 Stat. 1321-53); attempting to influence the issuance, amendment, or revocation of executive orders, or regulations, or statements of general applicability by any federal, state, or local agency (§ 504(a)(2), 110 Stat. 1321-53); and attempting to

influence any part of an adjudicatory proceeding of any federal, state, or local agency that is designed for the formulation or modification of any agency policy of general applicability (§ 504(a)(3), 110 Stat. 1321-53). Pet. App. 23a-25a. The court held that those restrictions are "based on subject matter, not viewpoint," and merely prohibit fund recipients from engaging in activities outside the scope of the program. *Id.* at 24a.

Finally, with regard to the parallel restriction in Section 504(a)(16), the court similarly upheld as viewpoint neutral the general prohibitions against an LSC fund recipient initiating legal representation or otherwise participating in litigation, lobbying, or rulemaking "involving an effort to reform a Federal or State welfare system," because those prohibitions can be read as prohibiting activity that either supports or opposes welfare reform. Pet. App. 25a-28a. The court invalidated, however, as impermissible viewpoint discrimination, the proviso to Section 504(a)(16) that allows individual representation of a client seeking specific relief from a welfare agency, but only if the relief does not involve an effort to amend or otherwise challenge existing law. *Id.* at 28a.

The court acknowledged that in *Rust* this Court stated that "the Government has not discriminated on the basis of viewpoint" when "it has merely chosen to fund one activity to the exclusion of the other," Pet. App. 30a, and that those words from *Rust* "seem on their face" to support the dissenting view of Judge Jacobs, who would have sustained the provision. *Id.* at 31a. The majority stated, however, that it "doubt[ed] these words can reliably be taken at face value." *Ibid.* The court thought it "inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding

support for, but barring criticism of, governmental policy." *Id.* at 32a. The court distinguished *Rust* and *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), on the ground that, in its view, a lawyer's argument that a statute or rule is unconstitutional or otherwise illegal "falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art," and that the welfare proviso represents an attempt to drive ideas from the "marketplace" of the courtroom. Pet. App. 33a-34a.

The court of appeals directed the district court to enter a preliminary injunction barring enforcement of the proviso against an LSC fund recipient representing individual clients who seek relief that would involve amendment or invalidation of existing law. Pet. App. 37a. The court thereby effectively broadened the provision allowing representation in individual welfare cases to extend the clause to *all* cases where an individual client seeks specific relief from a welfare agency. *Id.* at 38a.

b. Judge Jacobs concurred in the majority's decision insofar as it sustained the funding restrictions, but dissented insofar as it struck down the proviso in Section 504(a)(16). Pet. App. 38a-50a. In Judge Jacobs' view, this case falls within the teaching of *Rust* because the LSC Act as a whole funds a program that provides certain services and the proviso to Section 504(a)(16) merely prohibits LSC fund recipients from "rendering services that fall outside the scope of the program." *Id.* at 44a; see also *id.* at 40a, 46a-47a. He did not view as controlling this Court's decision in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), cited by the majority (Pet. App. 29a-30a), because an LSC fund recipient "is not a public forum or the participant in a public forum in which it is invited to

contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes." *Id.* at 40a.

Judge Jacobs emphasized that the invalidated proviso does not disfavor the speech of clients, because the limitation applies regardless of the ground on which the client seeks relief that would amend or invalidate existing law. He also emphasized that "[t]he majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a 'viewpoint' at all, it is one that advocates the delivery of welfare benefits to claimants." Pet. App. 39a.

## SUMMARY OF ARGUMENT

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, prohibits representation by LSC fund recipients of an individual seeking relief from a welfare agency, if the relief sought involves an effort to amend or otherwise challenge existing welfare law. Thus, the proviso identifies a category of cases in which LSC fund recipients may not provide legal representation—cases in which the relief sought includes an effort to amend or otherwise challenge existing welfare law. That limitation on the LSC program does not constitute impermissible viewpoint discrimination. The Section 504(a)(16) proviso is part of a generally applicable and permissible limitation on a federal program and furthers implementation of welfare programs by providing LSC-funded legal representation to individuals who have been wrongly denied

benefits the government intended for them to receive under the welfare programs. The fact that Congress did not also establish an LSC program to fund challenges to the welfare programs themselves does not make the LSC program it did fund an unconstitutional exercise in viewpoint discrimination. As this Court made clear in *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991), "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."

That is particularly true in the present setting because an LSC fund recipient is free fully to explain to any individual seeking representation why it cannot accept representation, and it may freely refer the individual to any other attorney, a pro bono project, or any non-LSC funded office. Attorneys employed by LSC fund recipients are free to express their own views regarding any legal matter—including offering the view that a welfare provision is unlawful or unconstitutional—and to refer individuals to an attorney who will represent them in litigation that attorneys employed by the LSC fund recipient may not conduct themselves. Thus, the Section 504(a)(16) proviso is not aimed at the suppression of dangerous ideas or driving certain ideas from the marketplace. Recipients and their employees remain free to communicate whatever message they desire to the public, or to their clients, or to individuals who seek representation; and their actual or potential clients remain free to engage in whatever activities they desire, including administrative proceed-

ings or litigation to amend or challenge existing welfare law, albeit without federally funded legal representation. As in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), Congress chose to allocate the limited resources of a funding program in a manner that takes into account the nature of the activities of the applicants. It may constitutionally do so for a wide variety of reasons, *id.* at 585, 587-588, including to target federal funding of legal representation for individuals improperly denied welfare benefits under existing law, but not for those who are not eligible under existing law.

The court of appeals also erred in applying what appears to be a public forum analysis, in reliance upon this Court's decision in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). Unlike the program at issue in *Rosenberger*, the LSC program is not dedicated to the promotion of diverse private expression in a public forum; it exists to subsidize certain discrete legal representation. The Ninth Circuit made this clear in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998), where the court rejected the contention that *Rosenberger* undermines the validity of the LSC limitations.

## ARGUMENT

### THE PROVISION IN SECTION 504(a)(16), PERMITTING REPRESENTATION BY LSC FUND RECIPIENTS OF INDIVIDUALS SEEKING RELIEF FROM A WELFARE AGENCY ONLY IF THE RELIEF SOUGHT WOULD NOT AMEND OR CHANGE EXISTING LAW, IS CONSISTENT WITH THE FIRST AMENDMENT.

#### A. Section 504(a)(16) Imposes A Reasonable Limitation Of General Applicability On The Types Of Legal Representation Or Other Activities That An LSC Fund Recipient May Undertake

1. Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, identifies a category of cases in which LSC fund recipients may not participate. It first sets forth a general prohibition against LSC fund recipients initiating any "legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." The court of appeals sustained that general restriction. Pet. App. 25a-28a.

Section 504(a)(16) then continues by providing a rule of construction, which states that the general prohibition "shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." § 504(a)(16), 110 Stat. 1321-55 to 1321-56. The final clause in that rule of construction—the proviso beginning with "if such relief"—serves to ensure that the general prohibition in the beginning of

Section 504(a)(16) against participating in efforts to reform a welfare system remains applicable even in a situation in which the LSC fund recipient is asked to represent an individual who seeks relief from a welfare agency.[10] Thus, under Section 504(a)(16), an LSC fund recipient may represent an individual who is seeking to obtain benefits *under* an existing welfare system, but not one who is seeking to *change* that existing system. Consequently, if an individual is seeking relief that would involve an amendment of or a challenge to existing welfare law and requests representation by an LSC fund recipient, the LSC fund recipient must decline the representation. The LSC fund recipient is free, however, to provide full information to the individual about the reasons for declining the representation and may refer the individual to any other attorney, a pro bono project, or any non-LSC funded office.[11]

Respondents repeatedly mischaracterize the proviso when they describe it as a prohibition against an LSC-funded attorney making particular arguments on behalf

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[10] As noted above (see pp. 11-12, *supra*), LSC's regulations define "existing law" to mean certain federal, state or local welfare statutes, regulations and ordinances. 45 C.F.R. 1639.2(b).

[11] As we explained at pages 10-11, *supra*, the LSC statutory and regulatory framework also allows LSC fund recipients to establish affiliated organizations that engage in restricted activities, so long as the LSC program-integrity standards are met. The court of appeals held that this framework, on its face, allows respondents adequate alternative channels for protected expression and defeats respondents' "unconstitutional conditions" argument. Pet. App. 17a-23a. Respondents seek review of that ruling in their petition in No. 99-604, *Velazquez* v. *Legal Services Corp.* The Court did not grant that petition when it accepted review in these cases. The court of appeals' ruling is correct, and further review by this Court is not warranted for the reasons set forth in our brief in opposition to that petition. 99-604 U.S. Br. in Opp. 12-18.

of a client in the course of litigation. See 99-603 Br. in Opp. 6, 10, 12, 18, 19; 99-960 Br. in Opp. 9-10, 11. As the dissent below recognized, "[t]he proviso on welfare litigation is not * * * an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place." Pet. App. 42a (Jacobs, J., dissenting in part).[12]

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[12] To the extent respondents speculate about ethical issues that an LSC-funded attorney might face in a particular case if a situation covered by the proviso arose in the midst of litigation (see 99-960 Br. in Opp. 9-10), those issues cannot properly be considered in the context of the instant case, which presents a facial challenge. Those issues involve as-applied hypotheticals. See *Finley*, 524 U.S. at 584 (noting the Court's reluctance to invalidate a statute based on hypothetical applications not before the Court). Moreover, respondents' contention that a general exception should be carved out of Section 504(a)(16) to allow representation by LSC fund recipients generally, notwithstanding the proviso, because of ethical issues that might arise in a particular case does not constitute an alternative basis for affirmance, as respondents claim. See 99-603 Br. in Opp. 9-11; 99-960 Br. in Opp. 9-10. Rather, such a construction of Section 504(a)(16) would require reversal of the court of appeals' judgment because it would confirm that Section 504(a)(16) is not vulnerable to a facial attack.

In any event, respondents' arguments are based on a misunderstanding of the applicable ethical standards. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996) (providing detailed analysis of a variety of ethical issues arising out of LSC restrictions and emphasizing, *inter alia*, that: certain representations cannot be undertaken at all; cases in which issues could arise mid-litigation should be avoided or back-up non-LSC

The Section 504(a)(16) proviso serves to ensure that LSC fund recipients use limited financial resources to provide assistance to individual eligible clients who are entitled to benefits under existing welfare law, but need legal representation to obtain them in administrative proceedings before a welfare agency or through an action in court. At the same time, by prohibiting LSC fund recipients from pursuing matters that involve efforts to amend or challenge existing welfare laws, Section 504(a)(16) directs LSC-funded efforts away from representation that is more complex, and more likely to be time-consuming and expensive, than the straightforward erroneous-denial-of-benefits case. The Section 504(a)(16) proviso thus serves to channel money to "the administration of a complex existing statute so that everyone can get what the statute provides." Pet. App. 48a (Jacobs, J., dissenting in part). It excludes expensive constitutional litigation and statutory challenges and "maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits." *Id.* at 50a. Indeed, the more complex cases involving constitutional challenges or other efforts to amend welfare laws are more likely to be high-profile cases and may be more attractive to pro bono programs or projects supported by private funds.

2. These evident purposes of the funding restriction are confirmed by the legislative history of Section 504.

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counsel should be arranged from the outset; and, in certain other situations, cases might have to be transferred to non-LSC lawyers or a separate organization may be created to represent clients not eligible for LSC representation).

The House Report, for example, explained with respect to the funding restrictions generally:

> It is both the right and the responsibility of the Congress to decide what programs and activities will be supported by Federal funds. Therefore, the Committee has included numerous terms and conditions which target scarce resources to programs whose mission is to provide basic legal assistance to the poor.

H.R. Rep. No. 196, 104th Cong., 1st Sess. 119-120 (1995).

Similarly, Senator Dole (in the course of advocating a program of block grants to the States) commented on a report that those engaged in furnishing legal services for the poor had moved away from helping individual clients toward conceiving of their task as the representation of the poor as a group. He expressed concern that, "despite many dedicated lawyers who have undoubtedly helped poor clients through Legal Services grants, the inevitable result of this shift in focus has been to hurt those whom the Corporation was created to help. The impoverished individual who has run-of-the-mill, but important, legal needs is shunted aside by Legal Services lawyers in search of sexy issues and deep pockets." 141 Cong. Rec. 27,020 (1995); see also *id.* at 27,001 (Sen. Domenici) (suing States over welfare reform should not be done by legal services, but rather "they should leave that to somebody else"; "this program ought to be for the individual poor people who have a need for a lawyer"); *id.* at 26,819 (Sen. Gramm) (individuals have a right to file a lawsuit to challenge the constitutionality of a state welfare law, but "they ought not to use taxpayers' money to do it"); 119 Cong. Rec. 20,688 (1973) (Rep. Biester) (commenting on the

original LSC Act ) (LSC fund recipients should provide individual representation to those who most need it and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation").

Section 504(a)(16) furthers those congressional purposes by precluding an LSC fund recipient from becoming involved in litigation, rulemaking, or similar proceedings that seek to amend or challenge existing welfare laws, and thereby diverting resources and efforts away from helping individual clients who were erroneously denied benefits. The application of the proviso to an LSC fund recipient's use of non-LSC funds is important to that objective. Because of the fungibility of money, a limitation on the use of non-LSC funds is appropriate to prevent LSC funds from subsidizing what Congress chose not to fund. As the district court (and a 1996 Senate Report concerning a subsequent authorization bill) explained:

> First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of watching LSC attorneys lobby legislators—even if that dismay might sometimes be misplaced.

Pet. App. 86a-87a (quoting S. Rep. No. 392, 104th Cong., 2d Sess. 7 (1996)).

### B. Section 504(a)(16) Is Not Based On Impermissible Viewpoint Discrimination

1. The court of appeals declined to recognize the Section 504(a)(16) proviso as part of a framework of generally applicable and permissible limitations on the federal program that Congress chose to establish and fund. The court of appeals instead regarded Section 504(a)(16) as based on unconstitutional viewpoint discrimination. That was error. Congress included the rule of construction permitting representation in connection with individual benefit claims in Section 504(a)(16) to further the implementation of welfare programs by providing LSC legal representation to individuals who have been wrongly denied benefits that the government intended for them to receive under those programs. The fact that Congress at the same time enacted a general prohibition against LSC fund recipients participating in litigation, lobbying, or rulemaking involving an effort to reform a welfare system simply means that Congress did not also establish a program to fund challenges to the welfare programs themselves. That judgment by Congress does not render the program it *did* fund an unconstitutional exercise in viewpoint discrimination.

As the dissent below pointed out, the LSC program that Congress tailored in this way is similar to a hypothetical program in which the federal government provides funds to a contractor to provide middle-class taxpayers with representation by tax lawyers and advice from accountants in connection with determining how much tax they owe. A proviso that limited the federally funded assistance by lawyers to obtaining the proper amount due under the present tax code, but prohibited those lawyers from taking on cases aimed at

tax reform or other efforts to reform or challenge the tax system, would not make the program impermissibly viewpoint-based. See Pet. App. 48a. Like Section 504(a)(16), it would merely ensure that the program operated within its intended limits (to assist people in getting what they were owed under existing law).

Congress's choice of the limits of the program may leave some needy individuals without the ability to obtain legal assistance from an LSC fund recipient in some agency or judicial proceedings. That, however, is the natural consequence of every choice Congress makes about the use of funds by organizations that receive federal funds under the LSC Act. Indeed, the court below, in the course of rejecting another of respondents' claims, emphasized that LSC fund recipients "have historically limited their representations to selected issues, and are typically 'able to meet only a fraction of the demand for their services.'" Pet. App. 16a (citation omitted). And, as Judge Jacobs pointed out in dissent, "[t]here is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise)." *Id.* at 42a-43a. The fact that Congress chose one means and not another to address a particular set of problems does not render the program it established impermissibly viewpoint based. It certainly cannot mean that the federal statute is susceptible to facial constitutional invalidation—relief that is "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Finley*, 524 U.S. at 580 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

This Court has made clear that "[t]he Government can, without violating the Constitution, selectively fund

a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). That is particularly true in the present setting, since the LSC fund recipient may exercise First Amendment rights through other channels. See note 11, *supra*.

In *Rust*, the petitioners made an argument almost identical to respondents' argument here, contending that a program funding family-planning services discriminated on the basis of viewpoint because it allowed speech discussing some viewpoints (those favoring certain family planning options) while prohibiting competing viewpoints (those favoring abortion as a method of family planning). 500 U.S. at 192. This Court expressly rejected that argument, holding, as set forth above, that Congress may choose to fund one program and not another and that such a choice does not constitute impermissible viewpoint discrimination. *Id.* at 193. Thus, *Rust* was "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope." *Id.* at 194; accord *Finley*, 524 U.S. at 587-588.

The same is true here. As in *Rust*, Congress has chosen to fund a certain program to the exclusion of another. Congress has chosen to fund representation in administrative or judicial proceedings in which individuals seek to establish their entitlement to benefits *under* a current welfare program (which is itself funded by the government), but not to fund representation in such proceedings in which individuals would ask the

agency to amend or the court to invalidate that very program in some respect. In that way, Congress has sought to maximize the availability of funds to pay for legal assistance that will enhance the value of the current welfare program to its intended beneficiaries by providing assistance to persons who believe they were wrongfully denied the benefits that the program, as currently constituted, makes available.

Attorneys employed by LSC fund recipients who are asked to represent other individuals, whose entitlement to welfare benefits would depend on revision or invalidation of the current welfare program in some respect, are free to inform those individuals that such representation is beyond the scope of the LSC program and to refer the individuals concerned to legal counsel outside the program, including any lawyer employed by an affiliated organization that the LSC fund recipient may have established in conformity with the LSC regulations. See p. 16, *supra*. The LSC program is thereby *less* restrictive than the program upheld in *Rust*, which prohibited physicians and other fund-recipient personnel from "referring a pregnant woman to an abortion provider, even upon specific request," and from providing any counseling about abortion. 500 U.S. at 180. Attorneys employed by LSC fund recipients are free to express their views, to actual or potential clients or anyone else, regarding any legal matter—including offering the view that a welfare provision is unlawful or unconstitutional—and to refer individuals to an attorney who will represent them in litigation that attorneys employed by the LSC fund recipient may not conduct themselves.

Thus, the Section 504(a)(16) proviso is not aimed at the suppression of dangerous ideas or driving certain ideas from the marketplace. See *Finley*, 524 U.S. at

585-587. Recipients and their employees remain free to communicate whatever message they desire to the public, to their clients, or to individuals who seek representation; and their actual or potential clients remain free to engage in whatever activities they desire, including administrative proceedings or litigation to amend or challenge existing welfare law, albeit without federally funded legal representation. As in *Finley*, Congress chose to allocate the limited resources of a federally funded program in a manner that takes into account the nature of the activities of the applicants. It may do so constitutionally for a wide variety of reasons, *id.* at 585, 587-588, including to target federal funding of legal representation for individuals improperly denied welfare benefits under existing law, but not for those who are not eligible under existing law. That choice by Congress is as valid as are all the other choices Congress has made from the outset of the LSC program in 1974 to specify the types of legal representation that are covered by the program and the types that are beyond its scope. Congress never intended for LSC attorneys to provide comprehensive legal services to their clients; Congress intended for them to furnish the types of legal services that it believed best served the public interest, and Congress does not act unconstitutionally when it specifies those services in legislation.

2. The court of appeals attempted to distinguish this case from *Rust* and *Finley* on the rationale that this case involves restrictions on speech that is critical of the government, which the court regarded as more protected by the First Amendment than abortion counseling or indecent art. But that rationale was based on the court of appeals' erroneous construction of the Section 504(a)(16) proviso as preventing LSC-funded lawyers from making certain arguments during the

course of legal representation. See Pet. App. 33a-34a. As discussed above, the Section 504(a)(16) proviso prevents LSC fund recipients from engaging in representation at all if a case involves a request for a particular form of relief—namely, amendment or invalidation of a welfare statute or regulation. See *id.* at 42a-43a (Jacobs, J., dissenting in part). Thus, the proviso does not exclude certain viewpoints in the course of litigating a particular case; it excludes a certain class of cases from the scope of the program altogether, in order to ensure that the program focuses on the day-to-day legal problems of poor people who are attempting to obtain benefits to which they claim entitlement under existing welfare programs.[13]

The court of appeals also erred in applying what appears to be a public forum analysis, in reliance upon this Court's decision in *Rosenberger*. The program at issue in *Rosenberger* was very different from the programs at issue in *Rust* and here. It was designed to encourage diverse private expression, and the Court held that the university had, in effect, created a limited public forum for such private expression. 515 U.S. at

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[13] A proper understanding of the Section 504(a)(16) proviso wholly undermines respondents' suggestion (99-603 Br. in Opp. 18-20) that the judgment below could be affirmed on separation-of-powers grounds. First, the proviso in no way interferes with a court's duty to interpret the Constitution. It does not authorize LSC attorneys to represent certain clients and then bar them from calling constitutional issues to the court's attention, as respondents would have it. *Id.* at 19. An LSC fund recipient is not authorized to represent that client at all. Second, the proviso does not mandate any rule of decision for courts. Individuals seeking welfare benefits by seeking to amend or challenge existing law are entitled to make any legal arguments they wish in support of their claim. They are not entitled, however, to have a federally funded attorney represent them in that litigation.

829-830; see *Finley*, 524 U.S. at 586; see also *id.* at 598-599 (Scalia, J., concurring) (noting that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum"); cf. *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1355 (2000) ("The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds.").

The LSC program, by contrast, is not dedicated to the promotion of diverse private expression in a public forum; it exists to subsidize certain discrete legal representation before an agency or in court. See Pet. App. 49a-50a (Jacobs, J., dissenting in part). The Ninth Circuit made this clear in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998), where the court (per Justice White, sitting by designation) expressly rejected the contention that *Rosenberger* undermines the validity of the LSC limitations. The court concluded that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, but "[l]ike the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, *not create a forum for the free expression of ideas.*" 145 F.3d at 1028 (emphasis supplied).

## CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds unconstitutional the proviso in Section 504(a)(16).

Respectfully submitted.

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## APPENDIX

1. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat 1321, 1321-50 to 1321-59, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and $7,100,000 is for management and administration: *Provided*, That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

* * * * *

SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to

provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation: *Provided*, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the

disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: *Provided further*, That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring,

including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to

section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if—

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and, for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that boards of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from—

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the

parties that make the request and the recipient does not arrange for the request to be made.

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal assistance for a case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act—

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection (a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11), and (15) of section 504(a) shall apply—

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assis-

tance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a)—

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

(c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and

guidance established by the Office of the Inspector General and shall report whether—

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of the recipient's failure to report. The auditor shall not be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits

shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant to such

rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to—

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of sub-recipients.

(k) The Legal Services Corporation shall—

(1) follow up on significant reportable conditions, findings, and recommendations found by the independent public accountants and reported to Corporation management by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the requirements of Office of Management and Budget Circular Number A-50.

(*l*) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

2. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat 3009, 3009-59 to 3009-60, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

* * * * *

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same

terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996;

* * * * *

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

3. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat 2440, 2510-2512, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

* * * * *

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal

Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996;

* * * * *

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in

accordance with the requirements referred to in subsection (a).

SEC. 504. (a) DEBARMENT.—The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS.—The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE.—In this section, the term "good cause", used with respect to debarment, includes—

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any

activity prohibited by, or inconsistent with, section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), section 502(a)(2) of Public Law 104-208 (110 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

4. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat 2681, 2681-107, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $300,000,000, of which $289,000,000 is for basic field programs and required independent audits; $2,015,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $8,985,000 is for management and administration.

ADMINISTRATIVE PROVISION—LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 1998 and 1999, respectively.

5. The Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-49, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $305,000,000, of which $289,000,000 is for basic field programs and required independent audits; $2,100,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; $8,900,000 is for management and administration; and $5,000,000 is for client self-help and information technology.

ADMINISTRATIVE PROVISION—LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 1999 and 2000, respectively.

6. Section 1610.8 of Title 45 of the Code of Federal Regulations provides in relevant part:

**PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY**

* * * * *

**§ 1610.8 Program integrity of recipient.**

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

7. Part 1639 of Title 45 of the Code of Federal Regulations provides in relevant part:

## PART 1639—WELFARE REFORM

### § 1639.1 Purpose.

The purpose of this rule is to ensure that LSC recipients do not initiate litigation involving, or challenge or participate in, efforts to reform a Federal or State welfare system. The rule also clarifies when recipients may engage in representation on behalf of an individual client seeking specific relief from a welfare agency and under what circumstances recipients may use funds from sources other than the Corporation to comment on public rulemaking or respond to requests from legislative or administrative officials involving a reform of a Federal or State welfare system.

### § 1639.2 Definitions.

(a) *An effort to reform a Federal or State welfare system* includes all of the provisions, except for the Child Support Enforcement provisions of Title III, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Personal Responsibility Act), 110 Stat. 2105 (1996), and subsequent legislation enacted by Congress or the States to implement, replace or modify key components of the provisions of the Personal Responsibility Act or by States to replace or modify key components of their General Assistance or similar means-tested programs conducted by States or by counties with State funding or under State mandates.

(b) *Existing law* as used in this part means Federal, State or local statutory laws or ordinances which are

enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto that have been formally promulgated pursuant to public notice and comment procedures.

**§ 1639.3 Prohibition.**

Except as provided in §§ 1639.4 and 1639.5, recipients may not initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system. Prohibited activities include participation in:

(a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system.

(b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system.

(c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

**§ 1639.4 Permissible representation of eligible clients.**

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

**§ 1639.5 Exceptions for public rulemaking and responding to requests with non-LSC funds.**

Consistent with the provisions of 45 CFR 1612.6 (a) through (e), recipients may use non-LSC funds to comment in a public rulemaking proceeding or respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee, or a member thereof, regarding an effort to reform a Federal or State welfare system.

**§ 1639.6 Recipient policies and procedures.**

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part.

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Nos. 99-603 and 99-960

Supreme Court, U.S.
FILED
JUN 13 2000
CLERK

IN THE

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner*,

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents*.

UNITED STATES OF AMERICA,

*Petitioner*,

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONER LEGAL SERVICES CORPORATION

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42 pp

## QUESTION PRESENTED

Whether Congress's decision to subsidize some legal services (to help individuals obtain all the benefits to which they are entitled under existing welfare laws) but not other legal services (to pursue broad-based litigation challenging reform of the welfare laws) violates the First Amendment's prohibition on viewpoint-based suppression of speech.

## PARTIES TO THE PROCEEDING

Three sets of litigants were parties to this case in the courts below: the plaintiffs, the defendant Legal Services Corporation, and the intervenor-defendant United States. The plaintiffs were Carmen Velazquez, WEP Workers Together; Community Service Society of New York, Inc.; New York City Coalition to End Lead Poisoning; Centro Independiente De Trabajadores, Agricolas, Inc.; Greater New York Labor-Religion Coalition; Farmworkers Legal Services of New York, Inc.; Peggy Earisman; Olive Karen Stamm; Jeanette Zelhof; Elisabeth Benjamin; Lauren Shapiro; Andrew J. Connick; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clatyon Powell, Jr. IV.; Lawrence Seabrook; and Scott M. Stringer. Two former plaintiffs, Lucy A. Billings and Jill Ann Boskey, are no longer parties to the proceedings.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 164 F.3d 757 (2d Cir. 1999), and is set forth in the Appendix to LSC's Petition for a Writ of Certiorari ("Pet. App. (99-603)") at 1a-41a. The order of the court of appeals denying the petitions for rehearing is dated July 8, 1999 and is set forth at Pet. App. (99-603) at 42a-43a. The opinion of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction is reported at 985 F. Supp. 323 (E.D.N.Y. 1997), and is set forth at Pet. App. (99-603) at 44a-84a.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999 and denied the petitions for rehearing on July 8, 1999. LSC filed its petition for a writ of certiorari on October 5, 1999, which was granted on April 3, 2000. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment I;
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321;
3. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009;
4. Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440; and

5. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 45 C.F.R. Part 1610 (1997).

## STATEMENT OF THE CASE

In appropriating funds for distribution to legal aid organizations, Congress has chosen to subsidize bread-and-butter legal services for individuals seeking benefits under existing welfare laws (so-called "suits for benefits"), but not broad-ranging litigation that challenges reform of the welfare laws. By a two-to-one vote, the United States Court of Appeals for the Second Circuit declared this "suit-for-benefits" limitation impermissible viewpoint-based discrimination under the First Amendment to the United States Constitution, and directed the District Court to enjoin petitioner Legal Services Corporation, which administers the federally subsidized civil legal services program, from enforcing the limitation. The facts governing respondents' facial challenge are as follows:

### A. Congress Creates the LSC Program to Provide Basic Legal Services to the Needy

In 1974, Congress created the Legal Services Corporation ("LSC"), an independent, District of Columbia non-profit corporation, to distribute federal funds to "qualified programs furnishing legal assistance to eligible clients." Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)) (the "LSC Act"). To carry out this mission, LSC distributes funds annually appropriated by Congress to eligible local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a).

From the beginning, Congress viewed the primary purpose of the LSC program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310, at 34 (1977)

(views of Rep. McClory). Thus, Congress intended the program to emphasize the "legal problems of eligible clients fall[ing] into four broad categories: family law; administrative benefits, including Medicaid, AFDC, and SSI; consumer law; and housing law." S. Rep. No. 95-172, at 3 (1977). As one Member of the House opined, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20,688 (1973) (statement of Rep. Biester).

To focus the LSC program on basic litigation for the poor, Congress expressly limited the scope of the program. For example, the statute barred LSC grantees from participating in litigation concerning school desegregation and "draft dodgers." *Id.* §§ 2996f(b)(8) and (10). The LSC Act also prohibited most criminal representation and limited civil litigation involving prisoners, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5) and 2996f(b)(1)-(4). Moreover, to insure that the program "be kept free from the influence of or use by it of political pressures," 42 U.S.C. § 2996(5), the LSC Act barred political activity and restricted lobbying by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Most of these restrictions applied to LSC grantees even if the activities in question were funded by private donations. *Id.* § 2996i(c). *See also* C.A.J.A.[1] 297-98 (¶¶ 3-8).[2]

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[1] Citations to "C.A.J.A." are to the Joint Appendix submitted in connection with the Second Circuit appeal below.

[2] *See also* S. Rep. No. 95-172, at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources

Congress believed these restrictions were necessary to keep the program apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310, at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office); *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (upholding regulation barring redistricting activities).

## B. Congress Decides to Continue Funding the LSC Program As Long As the Program Focuses on Basic Legal Services

Despite these restrictions, some members of Congress came to believe that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14,592 (Sept. 29, 1995). *See also* Pet. App. (99-603) at 48a-49a. In the mid-1990s, some of these representatives attempted to eliminate LSC entirely.

In 1996, rather than cease funding for LSC, Congress enacted compromise legislation that imposed new restrictions designed to refocus LSC on its central mission: "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14,605 (Sept. 29, 1995) (Sen. Stevens). *See also* S14,590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)); 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor.") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter); 142 Cong. Rec. H8189

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as those that are imposed on funds received from [LSC]"); 45 C.F.R. pts. 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

(July 23, 1996) (emphasizing "bread-and-butter services") (Rep. Torkildsen); 141 Cong. Rec. S18,160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

The new restrictions, which were incorporated in the 1996 Omnibus Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321 (the "1996 Act"),[3] were designed to prevent federal funds from subsidizing, for example, class action litigation or cases in which attorneys' fees are sought; representations of certain aliens or incarcerated persons; or certain lobbying and advocacy activities. 1996 Act §§ 504(a)(2)-(4), (7), (11), (13), (15), and (18).

The congressional debates make clear that the 1996 compromise legislation was intended to save LSC and preserve its original focus and mission. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions, they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996). *See also* 141 Cong. Rec. S14,607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded.") (Sen. Lautenberg); S14,612 ("[S]ome restrictions are necessary to ensure support for the program. . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work.") (Sen. Kennedy).

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[3] The restrictions were continued in subsequent legislation in 1997 (Pub. L. No. 104-208, 110 Stat. 3009) and 1998 (Pub. L. No. 105-119, 111 Stat. 2440). For ease of reference, we will refer to only the 1996 Act. The relevant portions of each statute are set forth at Pet. App. (99-603) at 85a-111a.

## C. The Suit-for-Benefits Limitation

Included in the new 1996 restrictions was the "suit-for-benefits" limitation that the court of appeals ultimately declared unconstitutional, and that is the sole issue before this Court.

Section 504(a)(16) of the 1996 Act denies funding to any entity "that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system. . . ." This section includes an exception to this limitation *permitting* an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* This exception confirms the ability of LSC-funded lawyers to bring a suit for welfare benefits, *i.e.*, to represent an individual seeking specific relief from a welfare agency, so long as that representation does not run afoul of the general prohibition on participating in efforts to reform a welfare law.

Although the precise contours of Section 504(a)(16) have never been tested, LSC has enacted regulations that explain more precisely the activities that are *prohibited*:

> (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system;
>
> (b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system; and
>
> (c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

45 C.F.R. § 1639.3 (1997). Thus, insofar as litigation is concerned, LSC lawyers cannot take on representations involving claims that would challenge a welfare reform law that has already been enacted.

Notwithstanding this restriction, LSC grantees can represent clients who will raise a broad variety of claims for benefits under existing welfare law:

> [W]hen representing an eligible client seeking individual relief from the actions of an agency taken under a welfare reform law or regulation, a recipient may challenge an agency policy on the basis that it violates an agency regulation or State or Federal law or challenge the application of an agency's regulation, or the law on which it is based, to the individual seeking relief.

Preamble to Final Rule 45 C.F.R. Part 1639, 62 Fed. Reg. 30,763, 30,765-66 (June 5, 1997). Thus, an LSC grantee can represent a welfare claimant who will maintain, for instance, that an agency policy violates existing law; that an agency made an erroneous factual determination under existing welfare law; or that an agency misread or misapplied a term contained in an existing welfare law.

In sum, although LSC lawyers cannot take on representations designed to *change* welfare laws, they are free to help clients obtain welfare benefits to which they are entitled under the *existing* welfare laws. This is precisely the type of representation that falls within LSC's mandate to provide basic legal services to the poor.[4]

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[4] If an LSC funded lawyer represents a client who originally brings a suit for benefits, but subsequently decides to challenge a welfare reform law, the lawyer should discontinue the representation "consistent with the applicable rules of professional responsibility." *Cf.* 45 C.F.R. § 1626.9 (1997) (governing changes of circumstances in representations of eligible aliens). This provision is consistent with LSC's statutory mandate to "ensure that activities under this

### D. In Response to Litigation, LSC Issues "Program Integrity" Regulations that Leave Adequate Alternative Channels for LSC Grantees to Bring Reform-Oriented Welfare Litigation

In a span of several weeks in late 1996 and early 1997, plaintiffs in the District of Hawaii and the Eastern District of New York filed two separate motions for preliminary injunctions seeking to enjoin LSC from enforcing many of the restrictions in the 1996 Act. The plaintiffs included LSC organizations, lawyers, clients, and donors, who argued that the 1996 restrictions, in combination with LSC's then-existing regulations, violated various constitutional rights.

The Hawaii district court ruled first. On February 14, 1997, it imposed a preliminary injunction enjoining LSC from enforcing some of the congressional restrictions under LSC's then applicable "interrelated organizations" policy. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402, 1410-11 (D. Haw. 1997) (*"LASH I"*). Specifically, the court focused on whether LSC's interrelated organizations policy, which was designed to regulate the relationship between LSC grantees and separate affiliate organizations that engaged in unsubsidized activities, left LSC grantees with adequate alternative channels for engaging in the restricted activities with non-federal funds. *Id.* at 1414-17. After comparing LSC's interrelated organizations policy with federal "program integrity" regulations upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Hawaii court found that LSC grantees did not have adequate alternative avenues for engaging in restricted First Amendment activities. *Id.* Based on this finding, the court held that the *LASH*

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subchapter are carried out in a manner consistent with attorneys' professional responsibilities." 42 U.S.C. § 2996e(b)(3); *see also* 42 U.S.C. § 2996(6). Thus, after the 1996 restrictions were passed, LSC lawyers withdrew from numerous matters in an orderly manner. C.A.J.A. 320-21, ¶4.

plaintiffs had a fair likelihood of showing that the government had imposed an unconstitutional condition on their receipt of federal subsidies. *Id.* at 1416-17.

In response to the Hawaii district court's ruling, and while respondents' motion for a preliminary injunction was still pending in the New York district court, LSC published interim rules that revised its previous interrelated organizations policy. C.A.J.A. 322-24 and 356-59. Although the revised rules included physical and financial separation requirements modeled after those upheld by this Court in *Rust* (C.A.J.A. 495 and 507), the revised rules were not identical to those upheld in *Rust*, as the New York district court noted at oral argument. Pet. App. (99-603) at 61a-63a.

In response to comments made at oral argument before the district court for the Eastern District of New York, and after receiving public comments on the new interim rules, LSC revised its rules again, and issued final rules that it denominated "program integrity" regulations. 45 C.F.R. pt. 1610.[5] These rules eliminated the "interrelated organizations" policy completely, and removed minor variations in wording between the interim rules and the program integrity regulations previously approved by this Court in *Rust*.

The final program integrity rules permit an LSC grantee to establish a separate affiliate organization to pursue restricted activities as long as the affiliate has "objective integrity and independence" from the LSC grantee. 45 C.F.R. § 1610.8(a). For the LSC grantee and the affiliate to have "objective integrity and independence," the two organizations must be "legally separate;" the affiliate must receive "no transfer of LSC funds" so that "LSC funds do not subsidize restricted activities;" and the two organizations must be "physically and financially separate." *Id.*

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[5] These regulations are set forth at Pet. App. (99-603) at 112a-132a.

Moreover, for the two organizations to be physically and financially separate, "mere bookkeeping separation of LSC funds from other funds is not sufficient." 45 C.F.R. § 1610.8(a)(3). Rather, physical and financial separateness will be based on consideration of several non-dispositive, non-exclusive factors, including: the "existence of separate personnel;" the "existence of separate accounting and time-keeping records;" the "degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities"; and the "extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] organization are present." *Id.*

These regulations permit LSC grantees to establish separate affiliate organizations to engage in the activities that Congress chose not to fund, as long as federal funds do not indirectly subsidize those activities, and it does not appear that Congress is funding those activities.

### E. LSC's Regulations Also Allow LSC Lawyers and Potential Clients to Conduct Welfare Reform Litigation Outside the Program

Although LSC modeled its program integrity regulations after the program integrity regulations upheld in *Rust*, LSC's regulations do not include the other restrictions at issue in *Rust*, which limited the advice that federally subsidized doctors and nurses could give their patients.

For example, if a lawyer in an LSC-funded program determines that a prospective client should pursue a litigation strategy that the LSC-funded lawyer is prohibited from pursuing, the LSC lawyer can advise the client of his or her right to pursue this strategy through an attorney employed by an organization outside the LSC program. Pet. App. (99-603) at 65a-66a and 82a. Thus, although the LSC grantee cannot represent the client, the prospective client still enjoys

the benefit of a fully informed consultation with an LSC attorney.

After advising the prospective client of his or her right to pursue a litigation outside the scope of the LSC program, the LSC-funded lawyer can even refer the prospective client to a lawyer who can handle the matter. *Id.* As a result, Congress' decision not to subsidize lawsuits challenging welfare reform does not inhibit prospective clients from filing such lawsuits outside the LSC program.

Moreover, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations. C.A.J.A. 294-95. Thus, a lawyer employed part-time by an LSC grantee can participate in a reform-oriented welfare litigation while separately employed by a non-LSC funded organization.

Finally, full-time employees of LSC-funded organizations are free to engage in the restricted "advocacy" activities in their individual capacity, on their own behalf, and on their own time. *Id.* As a result, LSC-funded attorneys can express their personal opposition to existing welfare laws, and their personal views on welfare reform, as long as these unsubsidized activities occur outside the LSC program.

### F. The District Courts Deny Respondents' Motions for Preliminary Injunctions

On August 1, 1997, after considering the impact of LSC's revised final rules on its initial ruling, the Hawaii court dissolved its earlier injunction, and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) (*"LASH II"*). That decision was unanimously affirmed by the Court of Appeals for the Ninth Circuit. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998) (*"LASH III"*).

On December 22, 1997, the New York district court also denied respondents' motion for a preliminary injunction (Pet. App. (99-603) at 44a-84a), relying heavily on LSC's decision to revise its regulations in accordance with *Rust*. *Id.* at 83a. The district court held that the regulations permitted adequate alternative channels for LSC grantees to conduct restricted activities, and were a permissible attempt by LSC to guard against the appearance that Congress was supporting the restricted activities. *Id.* at 72a-75a. The court also found that "the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship. . . . Indeed, they simply proscribe the activities in which LSC recipients may engage." *Id.* at 81a. The district court rejected Respondents' attempt to distinguish the doctor-patient relationship considered in *Rust* from the lawyer-client relationship at issue here. *Id.*

### G. The Court of Appeals for the Second Circuit Upholds Almost All of the Congressional Restrictions

On appeal, the Court of Appeals for the Second Circuit unanimously affirmed the lower court's ruling in all but one respect. In upholding almost all of the congressional restrictions, the court recognized several important principles.

Most important, the court of appeals acknowledged Congress' power to subsidize some services but not others:

> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

Pet. App. (99-603) at 15a.

Accordingly, the court of appeals rejected Respondents' claim that the regulations interfered with the "associational bond" between lawyers and their clients. In denying this claim, the court held:

> Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. . . . Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all-encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice."

Pet. App. (99-603) at 14a (quoting *Rust*, 500 U.S. at 200). The dissent agreed. Pet. App. (99-603) at 36a.

The court of appeals also held that most of the challenged restrictions were viewpoint-neutral as to speech. Pet. App. (99-603) at 20a-23a.

Finally, the court recognized that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Pet. App. (99-603) at 17a. The court of appeals held that even if the congressional restrictions burden First Amendment activity, LSC's newly promulgated program integrity regulations allow sufficient alternative channels for protected expression, at least insofar as this facial challenge is concerned. *Id.* at 15a-20a.

### H. The Court of Appeals Declares the Suit-for-Benefits Limitation an Unconstitutional Viewpoint-Based Infringement of Speech

Despite upholding several restrictions on the activities conducted by LSC grantees, the court of appeals held that the suit-for-benefits limitation constitutes unconstitutional viewpoint-based discrimination against speech. In so holding, the court of appeals construed the suit-for-benefits limitation as a "muzzle" on one of the most protected forms of expression (criticism of governmental policy) in a public forum for that expression (the courtroom). Pet. App. (99-603) at 27a-28a. As the dissenting judge explained, this holding was erroneous.

An important premise of the majority opinion was that an LSC-funded lawyer's argument is part of debate in a "public forum," because the courtroom is "the prime marketplace" for the idea that governmental policy is unconstitutional or illegal. Pet. App. (99-603) at 28a. But the LSC program, not the courtroom, is the proper focus of the forum analysis, and the LSC program is not a public forum. As the dissent stated, "a defined program of legal representation to indigent clients . . . does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients." Pet. App. (99-603) at 37a.

Of course, as the dissent noted, even if the courtroom were the proper forum to consider, it is not a public forum either. Pet. App. (99-603) at 40a (Dissent: "According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges).").

The court of appeals also held that "a lawyer's argument to a court that a statute, rule, or governmental practice . . .

is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art." Pet. App. (99-603) at 27a. As Judge Jacobs explained in his dissent, however, when lawyers advocate on behalf of their clients, the lawyers are not expressing their own political or ethical views; they are simply providing services. *Id.* at 39a-41a. A lawyer's argument does not implicate the lawyer's First Amendment rights.

Based on the assumption that the courtroom is a public forum for the First Amendment speech of lawyers, the court of appeals concluded that the suit-for-benefits limitation was "viewpoint-based" discrimination that "clearly seeks to discourage challenges to the status quo." Pet. App. (99-603) at 24a. In so holding, the majority expressly disregarded the central holding of *Rust* (a decision to "selectively fund a program . . . [does] not discriminate[ ] on the basis of viewpoint") with an expression of "doubt that these words can reliably be taken at face value." *Id.* at 25a. Thus, the majority dismissed *Rust's* holding as "a judicial precedent in a relatively unexplored area of law." *Id.*

After questioning the majority's "approach to Supreme Court opinions," the dissent explained that in the context of this program for services, the majority could not coherently identify a disfavored viewpoint, forum, or speaker. *Id.* at 38a-41a.

Finally, the Second Circuit speculated that if a welfare claimant originally brought a suit-for-benefits through an LSC lawyer, but then decided to amend the complaint to challenge a welfare reform law, the LSC lawyer would have to withdraw, severely prejudicing the client. Pet. App. (99-603) at 28a n.9. But, as the dissent noted, the majority should not have presumed prejudice on this facial challenge. Pet. App. (99-603) at 35a-36a. *See also supra* at p. 7, n.4.

## I. The Petition for Certiorari

On October 5, 1999, LSC filed a petition for a writ of certiorari seeking review of the majority's decision reversing the district court's refusal to grant a preliminary injunction as to the suit-for-benefits limitation. The petition was granted on April 3, 2000. *Legal Services Corporation v. Velazquez*, 120 S. Ct. 1553 (2000). This Court also granted the petition filed by the United States as intervenor, and consolidated the two cases. *Id.*[6]

## SUMMARY OF ARGUMENT

This case concerns Congress's power to control the use of federal funds by defining the scope of services provided in a federally subsidized program. Congress has decided to subsidize bread-and-butter lawsuits on behalf of individuals seeking benefits under existing welfare laws, but not broad-ranging litigation challenging welfare reform. This selective subsidy insures that federally funded lawyers help welfare claimants obtain all the benefits to which they are entitled under existing law, in accordance with the fundamental purpose of the LSC program: to provide basic legal services to the indigent.

In declaring this "suit-for-benefits" limitation impermissible viewpoint-based discrimination under the First Amendment to the United States Constitution, the Second Circuit misconstrued the limitation and the governing First Amendment decisions of this Court.

The suit-for-benefits limitation restricts *services*, not *speech*. When prospective clients consult lawyers in the LSC program, there are no restrictions on the dialogue between

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[6] This Court has not ruled on Respondents' petition, which sought review of that part of the Second Circuit's decision which unanimously affirmed the district court's denial of the preliminary injunction motion.

them. The LSC lawyers can advise potential clients of their right to challenge a welfare reform law. The LSC lawyers can also refer potential clients to non-LSC lawyers who can undertake such representations. And these non-LSC lawyers, who may be affiliated with LSC grantees, can file these lawsuits. Thus, the suit-for-benefits limitation does not restrict the speech of the LSC grantee, lawyer, or client; it restricts only the services that can be provided within the scope of the federal program.

A limitation on federally subsidized services does not violate the First Amendment. Congress has broad power to decide how federal funds are spent. Congress also has the power to apply limitations on federal funds to activities conducted with non-federal funds; if federal restrictions applied solely to grantees' use of federal funds, then grantees could re-configure their books to use federal funds to subsidize *indirectly* precisely those activities that Congress chose not to subsidize directly. In recognition of these powers, this Court has long distinguished between valid decisions not to subsidize the exercise of a constitutional right, on the one hand, and "unconstitutional conditions" that over-burden the exercise of a constitutional right, on the other.

Limiting the services offered in a federal program falls on the safe side of this line. In *Rust v. Sullivan*, 500 U.S. 173 (1990), this Court sustained a federally funded family planning program that excluded abortion-related services. Even the dissenting justices in *Rust* agreed that Congress has broad power to limit the services provided in a federal program; the *Rust* dissenters objected primarily to independent limitations on speech imposed on doctors and patients in the program (*id.* at 206, n.1)—speech-related restrictions that are notably absent from the suit-for-benefits limitation at issue here. In fact, the suit-for-benefits limitation, unlike the federal restrictions construed in *Rust*, does not prevent LSC-funded lawyers from advising prospective clients of their

right to challenge welfare reform laws. As a result, prospective LSC clients are absolutely free to pursue such lawsuits outside the LSC program and without federal funding.

The Second Circuit side-stepped these principles by construing the suit-for-benefits limitation as "viewpoint discrimination" against one of the "most protected categories of speech" in a "public forum." All three prongs of this holding are erroneous, as we explain below.

Congress did not create the LSC program "for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The LSC program is intended to provide specific services to the poor. Within this carefully defined program, Congress may validly subsidize legal assistance for individuals seeking benefits under existing welfare laws, but not for individuals seeking to change the welfare laws.

By the same token, a lawyer's argument to a court—even an argument that a welfare reform law is unconstitutional or illegal—is not a critique of governmental policy that represents an exercise of the lawyer's First Amendment rights; the lawyer's argument is merely a service for a client seeking relief. Thus, the suit-for-benefits limitation does not infringe the constitutional rights of the lawyer, or, for that matter, of the client, who remains free to challenge welfare reform without the federal subsidy.

Nor can the suit-for-benefits limitation be considered viewpoint discrimination. Helping welfare claimants obtain their full share of benefits does not, as the Second Circuit held, "discourage challenges to the status quo" (Pet. App. (99-603) at 24a); it simply helps the status quo (*i.e.*, the current welfare system) operate more smoothly. The First Amendment's prohibition on viewpoint discrimination does not also require Congress to subsidize the attempted overhaul of its welfare system.

For these reasons, this Court should reverse the Second Circuit's decision to invalidate the suit-for-benefits limitation.

## ARGUMENT

### A. Congress Has the Power to Selectively Subsidize Services Offered in a Federal Program

In a long series of decisions culminating in *Rust*, this Court has recognized the government's power to select some activities to subsidize, but not others, without violating individuals' rights to engage in the unsubsidized activities.

For example, in the First Amendment context, a selective subsidy does not infringe the constitutional rights of the unsubsidized person unless the refusal to subsidize is "aimed at the suppression of dangerous ideas." *Cammarano v. United States*, 358 U.S. 498, 513 (1959). In *Cammarano*, corporate taxpayers challenged an IRS regulation that excluded lobbying expenses from the definition of "ordinary and necessary expenses" that are deductible from a corporate taxpayer's income. The taxpayers argued, among other things, that they were being denied a deduction as punishment for engaging in their First Amendment right to lobby. This Court rejected the taxpayers' challenge, holding:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under provisions of the Internal Revenue Code.

*Id.*

In so holding, the *Cammarano* Court drew a critical distinction between a selective subsidy that validly controlled the use of governmental funds, on the one hand, and a

refusal to subsidize that imposed an "unconstitutional condition" on the exercise of unrelated constitutional rights (distinguishing *Speiser v. Randall*, 357 U.S. 513 (1958)).

Similarly, selective subsidies of pregnancy-related services but not abortion-related services do not violate a woman's constitutional right to decide whether to terminate a pregnancy, as long as the selective subsidy does not actually create an "obstacle" to the exercise of the woman's constitutional right. *Maher v. Roe*, 432 U.S. 464, 474-77 (1977); *Harris v. McRae*, 448 U.S. 297, 315-18 (1980). This rule is based on the principle that Congress has the power to promote some approaches to pregnancy over others.

To enforce a selective subsidy, the government also has the power to impose restrictions on the use of private funds as well as public funds; since money is fungible, restricting the use of only public funds might allow a recipient to use the public funds to conduct precisely the activities the government did not intend to promote.

In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) ("*TWR*"), a non-profit organization challenged the section of the Internal Revenue Code that denied tax-exempt status to non-profit organizations that engaged in "attempting to influence legislation." This Court unanimously held that the government's refusal to subsidize these lobbying activities did not violate the First Amendment because the statute was not "aimed at the suppression of dangerous ideas." *Id.* at 546-51 (citing *Cammarano*). This Court explained:

> The issue in these cases is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not.

*Id.* at 551.

In a concurring opinion, three justices emphasized that in their view, the statute threatened an unconstitutional condition because it withheld tax-exempt status not only for the lobbying activities that Congress did not want to subsidize, but also for all the other activities conducted by otherwise eligible organizations. *Id.* at 552. In the concurring justices' opinion, the statute was constitutional only because a separate subsection of the Internal Revenue Code permitted non-profit organizations to create affiliate organizations to engage in the disfavored lobbying activity; according to the concurrence, this alternative "channel of communication" rendered an otherwise unconstitutional statute constitutional. *Id.* at 552-54.

A year later, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) ("*FCC*"), this Court considered the same problem in the context of a cash subsidy. A non-profit corporation that owned several noncommercial educational broadcasting stations challenged a federal statute that forbid such stations from engaging in "editorializing," even if the editorializing was financed by non-federal funds. A 5-4 majority of this Court struck down the statute, because, among other things, the restriction on the use of non-federal funds was not ameliorated by the existence of alternative channels of expression, as in *TWR*. If, however, the statute had "permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism *would plainly be valid. . . .*" *Id.* at 400 (emphasis supplied). Taken together, *TWR* and *FCC* uphold the application of federal restrictions to activities conducted with non-federal funds, as long as the government allows alternative channels for the exercise of the unsubsidized rights.

In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court applied all these principles to a federally funded services

program known as Title X. Title X appropriated funds for distribution to family-planning services, but provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 178. In 1988, the Secretary of Health and Human Services ("HHS") promulgated new implementing regulations that expanded the scope of this restriction on abortion by prohibiting recipients of federal funds from encouraging, promoting or advocating abortion, either to their patients or in lobbying. Under these regulations, doctors and nurses were expressly prohibited from recommending abortion to a patient or from referring a patient to an abortion provider. *Id.* at 179-80. Moreover, to insure that federal funds did not indirectly subsidize abortion-related activities, the HHS regulations required a recipient of federal funds to conduct any abortion-related activities through an affiliate that was physically and financially separate from the federal program. *Id.* at 180-81.

This Court resoundingly upheld the HHS restrictions, at least insofar as the government was limiting the *services* the subsidized program could provide. As the majority opinion put it:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.* A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . . A refusal to fund protected activity, without

> more, cannot be equated with the imposition of a penalty on that activity.

*Rust*, 500 U.S. at 192-93 (internal quotations and citations omitted) (emphasis added).

Even the dissenters agreed that the limitation on services was constitutional under then governing law. In the words of Justice Blackmun's dissent (which was joined, in relevant part, by Justices Marshall and O'Connor):

> Were the Court to read [the statute] to prohibit only the actual performance of abortions with Title X funds . . . the provision would fall within the category of restrictions that the Court upheld in *Harris* v. *McRae* and *Maher* v. *Roe*. By interpreting the statute to authorize the regulation of abortion-related speech between physician and patient, however, the Secretary, and now the Court, have rejected a constitutionally sound construction in favor of one that is by no means clearly constitutional.

*Id.* at 206 n.1. Thus, the dissenters objected not so much to the limitation on services, but to the "gag order" that skewed the information that doctors and nurses could provide their patients. *Id.* at 211 (stating that regulations "manipulat[ed] the content of the doctor-patient dialogue . . .").

The majority, of course, upheld even the restrictions on speech, reasoning that they were merely incidental to the restricted services. *Id.* at 195 ("But we have here not the case of a general law singling out a disfavored group on the basis of speech, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."). Thus, the majority distinguished this governmental limitation on services (a context in which the government could regulate the services and thus the incidental speech) from a governmental limitation on speech.

The *Rust* Court also upheld the restrictions even as they applied to activities funded by non-federal sources, holding that HHS's program integrity regulations permitted adequate alternative channels for Title X grantees to conduct abortion-related activities with other funds. In so holding, this Court held that it was reasonable to require the Title X grantee's affiliate to be physically separate from the grantee to avoid the appearance that Congress was funding the affiliate. *Rust*, 500 U.S. at 187-91. The Court also held that it was permissible to require the affiliate organization to be financially separate from the Title X grantee because "Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* at 195 n.4. In sum, the Court held that the program integrity regulations allowed a Title X grantee to "continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Id.* at 196; *see also id.* at 199 n.5.

### B. The Court of Appeals Erroneously Disregarded *Rust* and its Antecedents

*Rust* squarely governs this case. In both cases, Congress provided a federal subsidy to promote certain basic services for the poor (medical services in connection with family planning, legal services in connection with suits for welfare benefits). In both cases, Congress decided not to subsidize certain other types of services (abortion, efforts to challenge welfare reform). In both cases, to prevent the subsidy from being used for the unsubsidized purposes, Congress decided not to provide the subsidy to service providers who engage in the unsubsidized activities even with non-federal money. And, finally, in both cases, the relevant administrative organization (HHS, LSC) adopted virtually identical policies to allow recipients of federal funds to affiliate themselves with

separate organizations that engage in the restricted activities. As Justice White wrote in *LASH III*, "there is no basis for distinguishing this case from *Rust*." 145 F.3d at 1024.

If anything, this case is more clear-cut than *Rust*. The suit-for-benefits limitation restricts only the services that lawyers can provide, not the advice they can give their clients. Potential LSC clients can have a full consultation with an LSC lawyer, even if they ultimately decide to bring a case that the LSC lawyer cannot handle within the confines of the LSC program. The lawyer's speech is not restricted or compelled; the client leaves the consultation completely informed; the lawyer-client dialogue is not distorted.

Because the prospective client receives full and independent advice, the prospective client's ability to challenge welfare reform law is not hampered. Rather, the prospective client is merely required to challenge welfare reform law through lawyers who are not federally subsidized.

The Court of Appeals for the Second Circuit recognized *Rust's* potential applicability, but refused to follow it. Instead, the court of appeals dismissed *Rust's* holding as "a judicial precedent in a relatively unexplored area of law," and its critical paragraph as "words" that cannot "reliably be taken at face value." Pet. App. (99-603) at 25a.

As this Court's opinion clearly indicated, however, *Rust* was the culmination of more than three decades of precedents on the issue of governmental subsidies. *Rust* explicitly incorporated the principles articulated by this Court from *Cammarano* through *FCC*. 500 U.S. at 192-200.

And *Rust's* continuing vitality was recently reaffirmed in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) ("*Finley*"). In *Finley*, performance artists and an artists' organization challenged a federal statute that required the Chairperson of the National Endowment for the Arts, in allocating federal subsidies to artists, to "tak[e] into

consideration general standards of decency and respect for the diverse beliefs and values of the American public." By an 8-1 majority, this Court rejected the artists' claim, relying on the central language of *Rust*, quoted above at pp. 22-23. *Finley*, 524 U.S. at 587-88. *Rust* cannot be given the back of the hand.

### C. The LSC Program Is Not a Public Forum for the First Amendment Expression of Lawyers or their Clients

In refusing to follow *Rust*, the court of appeals tried to shoehorn the suit-for-benefits limitation into the analytical framework of *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

In *Rosenberger*, a student organization challenged the University of Virginia's refusal to subsidize publication of their student newspaper; the University had decided to withhold a subsidy that was generally available to all student groups solely on the ground that the group's newspaper promoted religious activity. This Court held that the state university's decision not to fund religious speech was impermissible viewpoint-based discrimination because the University had created a limited public forum—a student activity fund designed to subsidize extracurricular activities, including the dissemination of student newspapers and other publications—and then discriminated on the basis of viewpoint within that public forum. *Rosenberger*, 515 U.S. at 833-34. The Court thus distinguished *Rust* (and its antecedents) on the ground that in *Rust* the government "used private speakers to transmit specific information pertaining to its own program," whereas in *Rosenberger* the University "create[d] a program to encourage private speech." *Id.*

To analogize the suit-for-benefits limitation to the University's decision in *Rosenberger*, the court of appeals

misconstrued the suit-for-benefits limitation as "viewpoint-based discrimination" against the "most protected form of expression" in a "public forum." All three premises of this analogy are flawed.

### 1. The LSC Program Is Not a Public Forum

The court of appeals first erred in holding that the suit-for-benefits limitation restricts speech in a "public forum," *i.e.*, courtrooms that are the "prime marketplace" for the idea that a welfare law is unconstitutional or illegal.

As a starting point, the relevant forum to be analyzed is the forum *created* by the federal subsidy, not a forum that exists separate and apart from the federal subsidy. As this Court explained in *Finley*: "We held [in *Rosenberger*] that by subsidizing the Student Activities Fund, the University had *created* a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints." *Finley*, 524 U.S. at 586 (emphasis supplied). *Cf. Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800-01 (1985) (when non-profit organizations challenged denial of access to charity drive program for federal employees, the relevant forum was the federal charity drive program, not the federal workplace as a whole).

Under this analysis, the forum in this case is not the courtroom or some other forum that exists independent of the LSC program and in which only a portion of LSC grantees' activities take place; the forum is the LSC program itself.

And the LSC program cannot be construed as a public forum, limited or otherwise. While the subsidy in *Rosenberger* was offered to all student organizations in a university setting, for the precise purpose of promoting expression, LSC's subsidies are offered to a limited universe of eligible legal aid organizations, for the very different purpose of providing services. As Justice White wrote for the Ninth Circuit in *LASH III*:

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny. This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers," unlike the LSC program where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

*LASH III*, 145 F.3d at 1028 (citations omitted).

Since LSC's subsidies are designed not to promote private speakers' expression, as in *Rosenberger*, but to advance the government's own policies, as in *Rust*, the First Amendment mandates of *Rosenberger* are inapposite. "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Board of Regents of Univ. of Wisconsin* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000).[7]

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[7] Even if the courtroom were the relevant focus of the forum analysis, the courtroom is not a public forum. "A courtroom is not a debate hall or gathering place for the public to exchange ideas; it is a forum for adjudicating the rights and duties of litigants." *Kelly v. Municipal Court*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996). *See also Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring) ("[A] courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis.").

### 2. The Suit-for-Benefits Limitation is At Most Content-Based, Not Viewpoint-Based Discrimination

The Second Circuit also erred by holding that the suit-for-benefits limitation constitutes viewpoint-based discrimination that "clearly seeks to *discourage* challenges to the status quo." Pet. App. (99-603) at 24a (emphasis supplied).

Although the suit-for-benefits limitation does prevent LSC grantees from engaging in litigation to challenge a welfare reform law, it is also the fact that the LSC program does not fund anyone to advocate the contrary view, *i.e.*, that the welfare reform laws should be maintained as they are. As a result, the limitation is neutral as to whether the welfare reform laws should be changed or maintained.

At most, the suit-for-benefits limitation creates a content-based distinction that removes governmental funding from a certain category of activity—advocacy designed to change or maintain the existing welfare laws—in order to define the scope of the federal program—helping indigents obtain whatever benefits exist under prevailing welfare law. As this Court held in *Rosenberger*, a content-based limitation is entirely appropriate for this purpose:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

515 U.S. at 829-30.

The distinction between content and viewpoint discrimination also undermines an analogy contained in the court of

appeals' opinion. The court of appeals considered it "inconceivable" that this Court would approve a hypothetical statute "to authorize grants funding support for, but barring criticism of, governmental policy." Pet. App. (99-603) at 26a. This imaginary statute is unlike the suit-for-benefits limitation, however, because the LSC program does not fund lawyers who support the current welfare reform regime any more than it funds lawyers who criticize that regime.[8]

A far more apt hypothetical was posed in the Second Circuit dissent. Judge Jacobs hypothesized a scenario whereby the Internal Revenue Service subsidized tax advice through outside accountants and tax lawyers, and then discovered that the tax lawyers were agitating for tax reform rather than helping to process individual taxpayers' returns. Pet. App. (99-603) at 39a. As Judge Jacobs put it:

> Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate computation of amounts due under the *present* tax code, and by barring advocacy aimed at, *inter alia*, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

*Id.*

Like this hypothetical tax program, the suit-for-benefits limitation does not operate to maintain the current welfare system; rather, it helps the current welfare system function

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[8] Moreover, the Second Circuit's hypothetical scenario plainly involves a subsidy designed to encourage speech, and thus create a limited public forum. As the contrast between *Rust* and *Rosenberger* makes clear, a subsidy to promote services is a different matter altogether.

more fairly. The First Amendment's prohibition against viewpoint discrimination does not oblige the government also to promote a very different political agenda: changing the welfare system.

### 3. Litigation Is Not a Specially Protected Form of First Amendment Expression for Lawyers or Clients

Finally, the court of appeals mistakenly held that litigation challenging governmental policy is one of the most protected forms of First Amendment expression. In so holding, the court of appeals apparently held that the suit-for-benefits limitation violates the First Amendment rights of *lawyers*.

But lawyers do not engage in litigation to vindicate their own constitutional rights. Litigation is a means to obtain relief for a client. A lawyer's argument is part of the package of services provided to the client, just as a doctor's advice concerning abortion is part of the package of services the doctor can provide to the patient. As Justice White, writing for the Ninth Circuit in *LASH III*, explained, the lawyers here are the means through which the Government "provide[s] professional services of a limited scope to indigent persons. . . ." *LASH III*, 145 F.3d at 1028.

Without a client who has an Article III case or controversy, the lawyer has no right to file a lawsuit, regardless of the lawyer's personal opinions on welfare reform. *See Zal*, 968 F.2d at 932 (Trott, J., concurring) ("In a courtroom, a lawyer without a client is like an actor without a part: he has no role to play, and no lines to deliver."). Indeed, a lawsuit filed solely for expressive purposes would be subject to dismissal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III standing requires injury in fact).[9]

[9] Moreover, although lawsuits obviously involve "speech," the court of appeals cited no authority for its contention that arguments

Thus, when a lawyer makes an argument on behalf of the client, the lawyer does not express his own views, let alone vindicate his own rights. *See Model Rules of Professional Conduct* Rule 1.2(b) (1995) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."). As far as the First Amendment is concerned, the lawyer is transparent.

For First Amendment purposes, the only person who has a cognizable "viewpoint" here is the prospective client. It is the prospective client who seeks to challenge the welfare reform law to obtain benefits that were denied under that law. And it is the prospective client who has the right to bring a lawsuit to obtain that relief.

The suit-for-benefits limitation does not penalize the prospective client. Welfare claimants who want to bring lawsuits challenging welfare reform are free to bring such lawsuits outside the federal program, without federal funding. Their First Amendment claim is readily extinguished by the bedrock principle that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . ." *TWR*, 461 U.S. at 549.[10]

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in a courtroom designed to secure a *statutory* benefit for a welfare claimant rank higher in the pantheon of free speech than speech related to a woman's *constitutional* right to decide whether to obtain an abortion.

[10] Considering the lawyer and the client as a unit does not strengthen Respondents' claim. Although the Court in *Rust* speculated that an "all-encompassing" doctor-patient relationship could enjoy First Amendment protection from governmental regulation (500 U.S. at 200), even the Second Circuit held in this case that the LSC program did *not* create an all-encompassing lawyer-client relationship or the expectation of such a relationship. *See supra*, at 12-13. Moreover, the suit-for-benefits limitation does not interfere with the lawyer-client relationship; in certain circumstances, it simply prevents such a relationship from even being created.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, insofar as it invalidated the suit-for-benefits limitation, should be reversed.

Dated: New York, New York
June 13, 2000

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IN THE

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner,*

-and-

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Did Congress violate the First Amendment and fundamental principles of separation of powers by authorizing lawyers receiving federal funds from the Legal Services Corporation to represent individuals and families seeking welfare benefits in court while barring those lawyers from challenging, on their clients' behalf, welfare statutes or regulations as unconstitutional or contrary to applicable statutes?

2. Did the Legal Services Corporation violate the First Amendment by requiring that any entity that receives funds from the Legal Services Corporation and that desires to use non-federal funds to permit lawyers to advance otherwise forbidden legal arguments must establish a wasteful and expensive physically separate facility to house the non-federally funded lawyers?

3. Does the text of the Legal Services Corporation Act of 1974, when read harmoniously with the 1996 appropriations rider at issue herein, authorize federally funded Legal Services lawyers to advance otherwise forbidden legal arguments when it is necessary to do so to prevent the possible commission of an ethical violation?

## PARTIES TO THE PROCEEDING

Three sets of litigants were party to this case in the courts below: the plaintiffs, the defendant Legal Services Corporation, and the intervenor-defendant United States. The plaintiffs consist of the following persons and not-for-profit corporations: Carmen Velazquez; Elisabeth Benjamin; Andrew J. Connick; Peggy Earisman; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clayton Powell, IV; Lawrence Seabrook; Lauren Shapiro; Olive Karen Stamm; Scott M. Stringer; Jeanette Zelhof; Centro Independiente de Trabajadores Agricolas, Inc.; Community Service Society of New York, Inc.; Farmworkers Legal Services of New York, Inc.; Greater New York Labor-Religion Coalition; New York City Coalition to End Lead Poisoning; and WEP Workers Together. All of the aforementioned plaintiffs support the judgment below. Two former plaintiffs, Lucy A. Billings and Jill Ann Boskey, are no longer parties to the proceedings. Ms. Billings has become a New York State judge. Ms. Boskey is deceased.

Legal Services of New York, the umbrella entity that receives and disburses funds from the Legal Services Corporation to local providers in the New York City area, has taken no position in this litigation.

## STATEMENT PURSUANT TO RULE 29.6

None of the corporate respondents have parent companies, nor is ten percent or more of the stock of any of them owned by any publicly held company.

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## BRIEF OF RESPONDENTS

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the laws identified in petitioners' briefs, this case involves article III of the U.S. Constitution and the provisions of the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1), requiring federally funded Legal Services attorneys to adhere to ethical standards of the profession. Those statutory provisions are set forth in the appendix (App.) to this brief at 1a-2a.

## STATEMENT OF THE CASE

From 1974 to 1996, a three-cornered partnership existed between and among Congress, private donors, and state and local governments permitting federally funded Legal Services lawyers[1] to offer a full spectrum of legal representation to indigent clients.[2] In 1996, Congress enacted a series of appropriations riders that effectively dissolved that partnership. First, Congress dramatically intensified the restrictions imposed on the use of federal funds by Legal Services lawyers. The particular 1996 restriction before the Court in this case forbids Legal Services lawyers from using federal funds to represent clients in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," but authorizes Legal Services lawyers to represent "an individual eligible client

1. Strictly speaking, there is no such thing as a Legal Services lawyer, since the Legal Services Corporation (LSC) merely funnels congressionally appropriated funds to hundreds of local non-profit entities that actually hire and supervise federally funded lawyers for the poor in civil cases. For simplicity's sake, however, respondents will use the shorthand term "Legal Services lawyer" to refer to LSC-funded lawyers.

2. From the beginning, litigation in connection with public assistance has been central to the mission of Legal Services lawyers. *See* Brief (Br.) of LSC at 3. Congress's annual appropriation for LSC has ranged from less than $100 million when LSC was first established to $400 million in FY 1995. Congress appropriated $283 million for each of FY 1997 and FY 1998, and $305 million for FY 1999.

who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pub. L. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996) (reproduced in Br. of U.S.-App. at 8a). The parties agree that the effect of Congress's baroque language is to authorize Legal Services lawyers to represent clients seeking welfare benefits under "existing law" — whatever that cryptic term may mean if it excludes the United States Constitution and the governing statutes as LSC suggests in its regulations, *see* 45 C.F.R. § 1639.2(b)[3] — but to forbid Legal Services lawyers from challenging the constitutionality or statutory validity of existing welfare statutes or regulations.[4]

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3. LSC's regulations concerning the welfare challenge provision are reproduced in Br. of U.S.-App. at 28a-30a.

4. In addition to the restriction before the Court in this case, the 1996 appropriations rider bars federally funded Legal Services lawyers from, among other things, participating in class actions, receiving court-awarded attorneys' fees under fee-shifting statutes, engaging in reapportionment litigation, appearing in administrative adjudication designed to make policy, and delivering legislative testimony without governmental invitation. *See* Pub. L. No. 104-134, §§ 504(a)(1)-(4), (7), (13), 110 Stat. at 1321-53 to 1321-56, Br. of U.S.-App. at 2a-3a, 8a. The 1974 LSC Act forbade the use of federal funds to represent clients in litigation seeking to desegregate schools, obtain non-therapeutic abortions, challenge Selective Service decisions, or defend against military desertion. *See* 42 U.S.C. § 2996f(b)(8)-(10). *See* Note, *The Constitutionality of Excluding Desegregation from the Legal Services Program*, 84 Colum. L. Rev. 1630 (1984). The constitutionality of selectively allocating Legal Services funding to impede the enforcement of disfavored legal rights has never arisen because, until 1996, gaps in congressional funding could be filled by the use of non-federal funds provided by state and local government. A petition for certiorari challenging the constitutionality of many of the 1974 and 1996 restrictions is pending before the Court. *Velazquez v. Legal Servs. Corp.*, No. 99-604. The 1996 restrictions were renewed by Congress in the 1997, 1998, 1999, and 2000 federal appropriations acts. *See* Br. of U.S.-App. at 18a-25a.

The impact of the congressional restriction currently before the Court, which became effective on or about September 1, 1997, was swift and dramatic. For example, respondent, Carmen Velazquez, then a 56-year-old grandmother living in the Bronx, had been represented by an attorney employed by Bronx Legal Services — an entity then receiving both federal funds from LSC and non-federal funds from the City and State of New York and from private donors. In connection with her claim that her public assistance benefits had been wrongfully terminated because of her presumed failure to have participated in a local job search program, Ms. Velazquez had asserted that a New York State regulation was unlawful because it did not afford her a pre-termination opportunity to demonstrate that physical impairments prevented her from working.[5] Since Ms. Velazquez was challenging, *inter alia*, a New York State welfare regulation, her claim was deemed barred by section 504(a)(16). Although adequate non-federal funding existed to allow Ms. Velazquez's Legal Services lawyer to continue the representation, the lawyer was forced to withdraw in order to preserve LSC funding for Bronx Legal Services, as well as for all other Legal Services programs in New York City.[6] Repeated efforts to locate substitute counsel failed,[7] and Ms. Velazquez suffered the permanent loss of the benefits at issue.

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5. *See* Amended Complaint ¶ 7(a), Joint Appendix (JA) at 17-18; Affidavit of Carmen Velazquez, JA at 51-55.

6. LSC has taken the position that a violation of section 504 by any LSC-funded lawyer in New York City triggers a cut-off of all federal funding to all LSC programs operating under the umbrella of Legal Services for New York City. After being forced to withdraw as Ms. Velazquez's lawyer, her Legal Services lawyer joined with the other plaintiffs to commence this action. She has since resigned from Bronx Legal Services, unable to practice effectively under Congress's restrictions.

7. Failure to locate substitute counsel for Ms. Velazquez was, sadly, not an isolated phenomenon. *See, e.g., Dugas v. Hoffpauir*, Civ. Action No. 6:93-1699 (W.D. La. 1996) (decertifying class

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The 1996 Congress also shredded the fiscal safety net that in the past had permitted local Legal Services programs to use non-federal funds to fill gaps in Congress's funding. *See* Pub. L. 104-134, § 504(d)(2)(B).[8] The plain language of the appropriations rider and the first two sets of regulations issued by LSC absolutely forbade local Legal Services entities from using non-federal funds to provide forms of legal assistance prohibited by § 504(a). Once it became apparent, however, that Congress's effort to bar Legal Services programs from using non-federal funds to support a full spectrum of legal services for the poor was clearly unconstitutional under *FCC v. League of Women Voters*, 468 U.S. 364 (1984),[9] LSC executed a 180-degree turn in an effort to salvage Congress's constitutionally flawed handiwork. LSC withdrew its initial regulations and replaced them with two new sets of regulations purporting to permit local Legal

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because of unavailability of substitute counsel to replace LSC-funded lawyer who was compelled by the restrictions to withdraw) (reproduced *infra* in App. at 3a-5a). *See generally* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-21 & n.5 (citing legal needs reports noting that between 70 and 90 percent of low-income households' legal needs are not being met).

8. The original Legal Services statute forbade Legal Services programs to use private donations to offer forbidden categories of legal representation, but contained no limitations on their use of state and local governmental funds. LSC Act § 1010(c), 42 U.S.C. § 2996i(c).

9. Two courts ruled that Congress's flat ban on the use of non-federal funds as implemented by LSC's first two sets of regulations was unconstitutional. *Varshavsky v. Perales*, No 40767/91, slip. op (N.Y. Sup. Ct. Dec. 24, 1996) (reproduced *infra* in App. at 6a-31a); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997), *vacated*, 981 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998). The District Court also made clear at oral argument in this case that LSC's initial refusal to permit the use of non-federal funds, and its clearly inadequate third set of regulations, violated *FCC v. League of Women Voters*.

Services entities to establish "separate" legal programs authorized to use non-federal funds to advance forbidden arguments — but only if the non-federally funded lawyers were housed in an expensive "physically . . . separate" facility.[10]

The District Court upheld both the congressional ban on using federal funds to challenge the legal *status quo* in welfare cases and the LSC restriction on the use of non-federal funds. LSC Cert. Pet. – App. at 44a-84a. Tellingly, however, the District Court explicitly found that the LSC requirement that non-federally funded lawyers be housed in a physically separate facility was not necessary to ensure the fiscal integrity of the federal program, since existing LSC rules already required precise record keeping and careful allocation of the cost of various activities. *Id.* at 73a. Rather, the District Court found that the requirement of physically separate facilities was justified solely by the need to prevent public confusion over whether the federal government "endorsed" Legal Services litigation against the government. *Id.* at 73a.

The Second Circuit, deeming itself bound by *Rust v. Sullivan*, 500 U.S. 173 (1991), affirmed the District Court's ruling that many of the 1996 restrictions on the use of federal funds by Legal Services lawyers were constitutionally permissible. LSC Cert. Pet.-App. at 13a-21a. The Circuit panel found that this Court's dictum in *Rust* suggesting that heightened First Amendment protection might attach to certain governmentally funded relationships of trust and confidence was not sufficiently precise to warrant providing heightened First Amendment protection to the relationship between a Legal Services lawyer and an indigent client. *Id.* at 13a-14a. Moreover, the Circuit panel rejected respondents' challenge to the LSC

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10. 45 C.F.R. § 1610.8(a)(3). *See* LSC Final Rule, "Use of Non-LSC Funds, Transfers of Funds, Program Integrity," 45 C.F.R. Part 1610 (reproduced in LSC Cert. Pet.-App. at 112a-125a) (summarizing LSC's fourth and final regulation).

requirement of a "physically separate" facility, ruling that the regulation was facially valid under *Rust*. *Id.* at 15a-20a.

A majority of the Circuit panel ruled, however, in an opinion authored by Hon. Pierre N. Leval, that Congress's decision to authorize federally funded Legal Services lawyers to represent indigent clients seeking welfare benefits, but to deny the lawyers the ability to challenge the constitutionality or statutory validity of an existing welfare statute or regulation, was a textbook case of allocating speech subsidies on the basis of viewpoint in violation of the First Amendment. *Id.* at 23a-28a. Judge Dennis Jacobs dissented, arguing that, under *Rust*, government is free to define the parameters of any program it funds without violating the First Amendment. *Id.* at 31a-41a.

Both sides sought certiorari. This Court granted petitioners' applications. The Court has not yet ruled in connection with respondents' petition, *Velazquez v. Legal Servs. Corp.*, No. 99-604.

## SUMMARY OF ARGUMENT

Congress's decision to authorize federally funded Legal Services lawyers to represent indigent clients seeking welfare benefits in court, but to forbid those lawyers from challenging the constitutionality or statutory validity of welfare statutes or regulations, offends the First Amendment in multiple ways. In the first place, as the Court below held, Congress may not selectively allocate speech subsidies in a viewpoint-discriminatory manner, especially when, as here, Congress is attempting to shield the government's own viewpoint from effective challenge. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Board of Regents of Univ. of Wisc. v. Southworth,* 120 S. Ct. 1346 (2000). In addition, once Congress fosters the establishment of a traditional lawyer-client relationship, it may not seek to control the judgment of a federally funded lawyer concerning whether to advance otherwise appropriate legal arguments on a client's behalf, even

when the government subsidizes the relationship. *NAACP v. Button*, 371 U.S. 415 (1963); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). And, by additionally barring federally funded lawyers from using non-federal funds to advance such forbidden arguments, Congress violates the First Amendment yet again. *FCC v. League of Women Voters*, 468 U.S. 364; *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Finally, the ban on challenging the legal *status quo* in welfare cases also violates fundamental principles of separation of powers by limiting the flow of otherwise appropriate legal argument to the courts in an effort to shield government action from judicial review. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

*Rust v. Sullivan* cannot immunize Congress's restriction against First Amendment attack because, unlike *Rust,* it is impossible to characterize the government as the true speaker where, as here, a subsidized speaker is suing the government on behalf of an indigent client. Moreover, unlike *Rust,* it is impossible to deny that a traditional lawyer-client relationship exists between a Legal Services lawyer and an indigent client. Petitioners seek to blunt respondents' First Amendment challenge by claiming that Congress has merely chosen to subsidize one type of legal "service" (help getting benefits under "existing law"), rather than another type of legal "service" (help challenging "existing law"). But the government's argument reduces the First Amendment ban on viewpoint-discriminatory speech subsidies to an exercise in semantics. Virtually every viewpoint-discriminatory allocation of a speech subsidy may be similarly repackaged as a decision to fund one type of "program" or "service" rather than another. Moreover, no matter what semantic disguise it elects to don, government may not impose on subsidized speakers viewpoint-based restrictions openly designed to insulate particular government decisions from effective legal challenge. Finally, Congress's effort to draw a bright line between litigation seeking benefits *under* "existing

law," and litigation *challenging* "existing law," is incapable of principled application. For example, obtaining relief under so-called "existing law" often requires a Legal Services lawyer to challenge the constitutionality or statutory validity of the government's interpretation of an existing statute or regulation in order to invoke the appropriate canon of construction. Most significantly, the Constitution and statutes actually comprise "existing law," and a ban on challenging "existing law" is incoherent insofar as it ignores this basic fact.

Petitioners also claim that the ban on challenging the constitutional or statutory validity of existing welfare statutes or regulations does not materially burden the speech of a Legal Services lawyer because the regulation does not prohibit the lawyer from speaking freely to a prospective client, to other lawyers, and to the general public. The primary speaker in this case is not, however, the subsidized lawyer, but rather the client for whom the lawyer is acting as a speech-proxy in addressing the Court. Moreover, the relevant audience is not the client or the general public, but an official who can do something about the legal problem — a judge or an administrative official. Congress has carefully forbidden the subsidized Legal Services lawyer from addressing any member of that audience.

Finally, petitioners argue that Congress's speech ban does not burden the attorney-client relationship or the institutional integrity of the judiciary because it merely prevents the attorney-client relationship from forming in the first place, diverting both the client and the argument to other lawyers who are free to advance the forbidden argument. It is, however, pure fantasy for petitioners to claim that all that is happening here is the deflection of an indigent welfare client to another lawyer who is free to make the necessary arguments. In most communities, there are no alternatives to the local Legal Services program. Those few alternatives that do exist in some urban areas are overwhelmed. And the alleged freedom to establish non-federally funded Legal Services affiliates to perform the tasks

is a mirage because it requires the establishment of wasteful and expensive "physically separate" facilities imposing a significant economic burden on the use of non-federal funds without any plausible justification.

Congress's decision to restrict the use of non-federal funds as the price of receiving a federal speech subsidy is also a violation of the First Amendment. The textually absolute restriction enacted by Congress renders the congressional statute flatly unconstitutional under *FCC v. League of Women Voters*, and invalidates LSC's attempt to promulgate an unauthorized ameliorative regulation designed to save the statute. Moreover, the regulation is itself violative of the First Amendment because its requirement that lawyers using non-federal funds be housed in a wasteful and expensive "physically separate" facility imposes a severe economic burden on the use of non-federal funds without any legitimate justification.

Congress's decision to prevent Legal Services lawyers from challenging welfare laws also violates fundamental separation of powers principles. By authorizing Legal Services lawyers to help implement welfare laws by representing litigants in court, but barring those lawyers from arguing that the welfare laws are invalid, Congress has interfered with the courts' decisional processes and has done so in an improper effort to shield legislation from constitutional scrutiny. Congress has thus violated the principle, elucidated in cases including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137; *United States v. Klein*, 80 U.S. (13 Wall.) 128; and *Dickerson v. United States*, 2000 WL 807223 (U.S. June 26, 2000), that the legislature may not seek to influence the outcome of pending cases by dictating a decisional process, overruling this Court's constitutional rulings or, as here, controlling the flow of information and argument to the courts.

It is possible, however, to avoid the serious constitutional issues raised by Congress's speech ban by reading the text of the LSC Act of 1974 — which repeatedly mandates strict

compliance with the highest standards of legal ethics — harmoniously with the restrictions imposed by the 1996 appropriations rider to authorize Legal Services lawyers to advance arguments premised on unconstitutionality or statutory invalidity when failure to do so would force a Legal Services lawyer to risk violating an ethical duty to one client in order to prevent the loss of funding for the program's remaining clients.

## ARGUMENT

### I.

### CONGRESS'S EFFORT TO AUTHORIZE FEDERALLY FUNDED LEGAL SERVICES LAWYERS TO REPRESENT INDIGENT CLIENTS SEEKING WELFARE BENEFITS UNDER "EXISTING LAW" BUT TO FORBID THE LAWYERS FROM ADVANCING ANY ARGUMENT THAT WOULD "AMEND OR OTHERWISE CHALLENGE EXISTING LAW" VIOLATES THE FIRST AMENDMENT

Classically, the First Amendment is invoked when the State acts negatively to limit the flow of disfavored speech. *See, e.g., United States v. Playboy Entertainment Group,* 120 S. Ct. 1878 (2000). But the First Amendment plays an important role, as well, in those settings where government acts positively to enable First Amendment activity that might not otherwise occur.[11] In recent years, this Court has

11. *See, e.g., Keyishian v. Board of Regents,* 385 U.S. 589 (1967) (academic freedom in state subsidized higher education); *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995) (equal access to public property designated as a public forum); *League of Women Voters,* 468 U.S. 364 (protecting use of private funds by subsidized speaker); *Speiser v. Randall,* 357 U.S. 513 (1958) (invalidating unconstitutional condition on receipt of government funds); *Cammarano v. United States,* 358 U.S. 498 (1959) (upholding limits on use of tax deductible funds for lobbying); (Cont'd)

repeatedly recognized that viewpoint-discriminatory speech subsidies violate the First Amendment because they distort the operation of an intellectual free market as seriously as do viewpoint-discriminatory speech prohibitions. *See Rosenberger*, 515 U.S. 819 (invalidating viewpoint-discriminatory subsidy); *Arkansas Educ. Television v. Forbes*, 523 U.S. 666 (1998) (warning against viewpoint-discriminatory subsidy); *Southworth,* 120 S. Ct. at 1357 (disapproving majoritarian allocation of subsidies as inviting viewpoint discrimination). *See also National Endowment for the Arts v. Finley*, 524 U.S. 569, 580-82 (1998) (construing government art funding statute narrowly to minimize risk of viewpoint-based discrimination).

Additionally, in *Rust*, the Chief Justice suggested that the First Amendment places limits on the power of government to interfere with traditional associational relationships of trust and confidence, even when the government subsidizes the relationship. *See* 500 U.S. at 200. *See also Button*, 371 U.S. 415 (recognizing that attorney-client relationship is protected by freedom of association); *Keyishian*, 385 U.S. 589 (protecting student-teacher relationship in state subsidized higher education). Congress's effort in this case to limit the speech of subsidized Legal Services lawyers violates both sets of First Amendment protections.[12]

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*Taxation with Representation*, 461 U.S. 540 (upholding grant of tax deductibility for lobbying expenses to Veterans' groups based on sacrifices of veterans). *See also Rust*, 500 U.S. at 200 (suggesting special First Amendment protection for certain government-subsidized relationships).

12. The role of the First Amendment in subsidized speech settings has been the subject of considerable academic commentary. *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L.

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### A. Congress May Never Allocate Speech Subsidies to Shield the Government's Viewpoint From Challenge

Congress's statutory scheme authorizes a subsidized Legal Services lawyer to urge a judge, on behalf of an indigent client, to enforce an existing welfare statute or regulation, but forbids the lawyer from urging the judge to view a particular welfare statute or regulation as unenforceable because it violates the Constitution or is inconsistent with governing statutory law or regulations. Congress has, therefore, not only openly allocated a crucial speech subsidy on the basis of viewpoint, it has done so in a self-interested manner designed to insulate the government's own viewpoint about the validity of its laws from effective challenge by the subsidized speaker. There simply could not be a more egregious violation of the core First Amendment principle of viewpoint neutrality. *See generally* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

This Court has invalidated far less egregious efforts to allocate speech subsidies on the basis of viewpoint. In *Rosenberger*, for example, the University of Virginia

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Rev. 675 (1992); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); Robert C. Post, *Subsidized Speech*, 106 Yale L. J. 151 (1996); Martin H. Redish & Daryl Kessler, *Government Subsidies and Free Speech*, 80 Minn. L. Rev. 543 (1996); Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989). For trenchant criticism of the very restriction before the Court, see Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1630 (1998); Association of Bar of City of N.Y., Comms. on Civ. Rts. & Prof'l Resp., *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 The Record 13 (1998). *See also* Note, *Recent Legislation*, 110 Harv. L. Rev. 1346, 1348-49 (1997).

provided subsidies to a broad array of student publications without regard to viewpoint, but declined, in deference to Establishment Clause values, to subsidize student religious publications. This Court ruled that Virginia's refusal to subsidize student religious publications constituted forbidden viewpoint-based discrimination despite the fact that Virginia was not motivated by hostility to religion. Justice Kennedy, writing for the Court, explained that the fact that the restriction even-handedly proscribed speech reflecting both religious and anti-religious perspectives in no way lessened the harm of the exclusion, or transformed it into one based on content, rather than viewpoint: "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." 515 U.S. at 831. In this case, even more so than in *Rosenberger*, in allocating speech subsidies Congress has singled out for exclusion a particular "perspective on the debate": the perspective suggesting government has enacted an illegal law.

In *Forbes*, this Court recognized that a public television station, as a protected speaker, enjoys broad First Amendment-based editorial discretion in structuring a candidate debate, including the right to exclude candidates with insufficient public support. The Court warned, however, that since a televised debate on public television is a form of government speech subsidy, access may not constitutionally be allocated on the basis of a candidate's viewpoint. 523 U.S. at 675-76.

Finally, in *Southworth*, the University of Wisconsin used mandatory student activity fees to provide speech subsidies on a viewpoint-neutral basis to a broad array of student organizations. The Court reaffirmed that, except where the government retains agents to communicate a government-defined message as in *Rust*, government speech subsidy

programs must always be scrupulously viewpoint-neutral, whether or not they unfold in a "public forum in the traditional sense of the term." 120 S. Ct. at 1354. *Southworth* rejected an effort by dissenting students to demand a *pro rata* refund for subsidies to organizations with which they disagreed. But the Court disapproved the practice of allocating speech subsidies by a vote of the student body, holding that such an overtly majoritarian allocation process poses too great a risk of viewpoint discrimination. *Id.* at 1357.

In each of *Rosenberger*, *Forbes*, and *Southworth*, the Court condemned a viewpoint-discriminatory allocation decision as a violation of the First Amendment. But in none of those cases was the government, as here, deploying speech subsidies on a self-interested basis, permitting recipients to support the government's viewpoint while simultaneously barring the subsidized speakers from seeking to mount an effective challenge to the government's viewpoint. It is not hyperbole, therefore, to observe that what Congress has done in this case is the most egregious violation of viewpoint neutrality to have come before the Court in recent years.

### B. Congress May Not Forbid a Subsidized Lawyer from Advancing Otherwise Appropriate Legal Arguments on Behalf of an Indigent Client

The First Amendment does more than protect a lawyer's ability to speak in court on behalf of a client. It protects, as well, a client's right to associate freely with a lawyer in an expressive associational relationship of trust and confidence designed to advance the client's interests. *See, e.g.*, *In re Primus*, 436 U.S. 412 (1978); *Button*, 371 U.S. 415. *See* Roth, *supra*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 111-14.[13]

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13. For recent cases recognizing that the First Amendment provides significant protection to expressive association, *see Hurley*

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This Court has repeatedly recognized that the intense bond between lawyer and client is an expressive associational relationship protected by the First Amendment against undue government interference. For example, in *Button*, Virginia attempted to invoke its barratry laws to prevent lawyers for the NAACP from counseling prospective clients about the possibility of litigation challenging segregated facilities. This Court rebuffed the attempted prosecution, holding that the associational bond between a lawyer and a prospective client (much less, as here, an existing client) is fully protected by the First Amendment. *See* 371 U.S. at 437. Similarly, in *In re Primus*, 436 U.S. at 431-32, 439, this Court refused to permit South Carolina to bar an ACLU lawyer from informing prospective clients — women who had been sterilized as a condition of receiving welfare benefits — of the availability of free legal assistance, on the ground that the First Amendment protected speech and association between lawyer and client from government interference. *See also Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1977) (invalidating Virginia's effort to prevent a labor union from referring its members' federal safety claims to selected lawyers); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971) (rebuffing Michigan's effort to prevent a union from referring its members' safety claims to lawyers promising to charge a reduced fee); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (holding that the First Amendment associational bond between lawyer and client precluded Illinois from applying its ethics rules against

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*v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *California Democratic Party v. Jones*, 2000 WL 807188 (U.S. June 26, 2000); *Boy Scouts of Am. v. Dale*, 2000 WL 826941 (U.S. June 28, 2000). A lawyer-client relationship is the paradigm of a protected expressive association. *See* Kenneth Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

a lawyer who was employed by a labor union to handle its members Workers' Compensation claims).

While Congress is not constitutionally obligated by the due process or equal protection clauses to provide lawyers for in the poor in all civil cases,[14] once Congress elects to fund a lawyer-client relationship, the First Amendment precludes government from denying an indigent client the ability to enjoy the benefits of such an expressive associational relationship, even when the government is paying for it. *Keyishian*, 385 U.S. 589; *Rust*, 500 U.S. at 200. Our law recognizes at least three important expressive associational relationships of trust and confidence that merit First Amendment protection, even when the relationship is subsidized by the government. This Court has held that the associational bond between university teacher and student precludes government from dictating the content of a professor's speech, even when the professor is employed by a government-funded institution. *Keyishian*, 385 U.S. 589. *See also Sweezy v. New Hampshire*, 354 U.S. 234 (1957). *See generally* Cole, *supra*, 67 N.Y.U. L. Rev. 675. The *Keyishian* Court explained that the functional integrity of the academic relationship between teacher and student rests on First Amendment protection of the ability of a university teacher to provide students with autonomous judgments that are not dictated by the state. 385 U.S. at 603-04.

Similarly, the functional integrity of the relationship between doctor and patient requires First Amendment associational protection assuring the patient that the government-funded doctor is free to provide the autonomous professional judgment that characterizes such a relationship, and not political medicine.

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14. *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). The *Lassiter* Court was unanimous, however, in recognizing a right to appointed counsel in cases where the issues require the presence of counsel for adequate ventilation. *Id.* at 31-34, 37-38.

The lawyer-client relationship merits at least an equivalent level of First Amendment associational protection. When an indigent client enters into an expressive associational bond with a government-subsidized lawyer, the client is constitutionally entitled to confidence that the representational judgments made by a government-funded lawyer are as protected from political manipulation as are the analogous judgments of a government-subsidized university professor, or a government-subsidized doctor. As the Chief Justice observed in *Rust*:

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. *It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government.*

500 U.S. at 200 (citation omitted and emphasis added). As the *Rust* Court's dictum suggests, when the government funds an attorney-client relationship, the spending power may not be used to manipulate the expressive associational activities of the participants.

### C. Petitioners' Efforts to Invoke *Rust v. Sullivan* to Avoid the Force of Respondents' First Amendment Objections Are Unavailing

*Rust* does not immunize Congress's speech ban from First Amendment attack. In *Rust*, Congress established a federally funded family planning program that explicitly excluded abortion as an acceptable form of family planning

and, according to the government, forbade doctors employed by the program from discussing abortion with their patients.[15] This Court upheld the restriction on the doctors' speech by a vote of 5-4, reasoning, first, that the true First Amendment speaker in *Rust* was the government, using paid doctor-spokespersons to disseminate a narrowly defined substantive message about the state-preferred forms of family planning, 500 U.S. at 194;[16] and, second, that a "traditional" doctor-patient expressive associational relationship did not exist in the context of a family planning clinic that purported to provide only an extremely narrow sliver of medical assistance. 500 U.S. at 200. Petitioners argue that Legal Services lawyers are likewise merely paid agents of the

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15. Justice O'Connor declined to read the statute in *Rust* as forbidding doctors employed in a family planning clinic to talk about abortion with their patients. 500 U.S. at 223-25 (O'Connor, J., dissenting). *See also Finley*, 524 U.S. at 580-82 (construing a government art funding statute narrowly to avoid risk of viewpoint-based discrimination).

16. In its recent subsidized speech cases, the Court has repeatedly emphasized that the result in *Rust* hinged on this all-important distinction. *See Rosenberger*, 515 U.S. at 833 ("[In *Rust*], the government did not create a program to encourage private speakers, but instead used private speakers to transmit specific information pertaining to its own program."); *Finley*, 524 U.S. at 612 ("Drawing on the notion of government-as-speaker, we held in *Rust v. Sullivan*, 500 U.S. at 194, that the Government was entitled to appropriate public funds for the promotion of particular choices among alternatives offered by health and social service providers."); *Southworth*, 120 S. Ct. at 1357 ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.") (citing *Rust*, 500 U.S. 173, and other cases) *See also Santa Fe Indep. Sch. Dist. v. Doe*, 2000 WL 775587, at *6 (U.S. June 19, 2000) (reaffirming significant First Amendment distinction between government speech and private speech pursued under government program).

government, delivering a narrowly defined "service" that forbids them from challenging the legal *status quo* on behalf of their indigent clients, just as the doctors in *Rust* were forbidden to venture beyond their narrowly defined "program" in serving their indigent patients.

Whatever the dubious wisdom of *Rust* on its facts, its reasoning cannot possibly apply to the self-interested, viewpoint discriminatory speech subsidy at issue in this case.[17] First, unlike *Rust*, it is impossible to characterize the government as the true speaker where a Legal Services lawyer is suing the government on behalf of an indigent client. *See Polk County v. Dodson*, 454 U.S. 312, 320 (1981)

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17. Respondents do not question the central legal premise of *Rust*: that government may speak in support of its programs free from the usual constraints of viewpoint neutrality. *See* MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983). But respondents respectfully suggest that *Rust* erred in its application of that premise to the facts of that case because the true speaker in *Rust* was not the government, but a doctor who was performing as a medical professional and not as a propagandist. Characterizing family planning clinic doctors as mere shills for the government's viewpoint denigrates their professional role in the program. Even more importantly, for many indigent women seeking medical assistance at a family planning clinic, the clinic doctor is the only physician they consult during their pregnancies, rendering the doctor-patient relationship in *Rust* one of enormous associational significance for many poor patients. The significant disconnect between the unobjectionable legal principle asserted in *Rust*, and its questionable application, has caused confusion at every level of government. *See, e.g., Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (invalidating effort to punish government-subsidized Brooklyn Museum for displaying controversial works of art). Thus, although it is not necessary to do so in order to affirm the ruling below, respondents urge the Court to re-consider its holding in *Rust*. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

(subsidized lawyers for the poor cannot be viewed as acting on behalf of the state in view of their duty of "undivided loyalty" to their clients and the corresponding "assumption that counsel will be free of state control"). Unlike the doctors in *Rust*, when a Legal Services lawyer speaks in court, the lawyer cannot fairly be characterized as articulating a substantive message on behalf of the State. Rather, the lawyer speaks on behalf of an indigent client, to whom the subsidized lawyer owes both ethical and statutory duties of unfailing loyalty. To the extent the government "speaks" in such a setting, it is through the words of its own lawyers and its own officials, not by commandeering the voices of the subsidized counsel that oppose it in litigation.

In establishing the Legal Services program in 1974, Congress self-consciously chose a broadly decentralized private structure designed to insulate Legal Services lawyers against government pressure to alter their speech. In order to foster independence from the government, Congress eschewed the creation of a centrally controlled Legal Services bureaucracy, electing to disburse Legal Services funds on a viewpoint neutral basis to an extremely broad array of private entities for use in hiring lawyers for the poor who would owe allegiance, not to the government, but to the private entities who hired them, and, most importantly, to the indigent clients they were pledged to serve. In order to further insulate Legal Services lawyers from government pressure, Congress provided for an autonomous private entity, LSC, to be the conduit through which congressional subsidies flowed to the numerous private entities who actually hire and supervise Legal Services lawyers. Finally, to ensure that Legal Services lawyers would speak for their clients, and not be tempted to deliver the government's preferred message, Congress repeatedly stressed that Legal Services

lawyers were to be governed by the canons of ethics and the Code of Professional Responsibility.[18]

Applying the reading of *Rust* as adopted in both *Rosenberger* and *Southworth*, we deal here, not with a government speaker charged with disseminating a particular government message as part of a narrowly focused substantive government program, but with a government decision to distribute speech subsidies to a broad array of private speakers on a viewpoint-neutral basis to ensure that vigorous and independent lawyers will be available to speak in court on behalf of the poor — even when that speech challenges the government's own policies. Under the clear holdings of this Court, such a widely available private speech subsidy may not be allocated in a viewpoint discriminatory manner, especially when, as here, the government is seeking to insulate its own viewpoint from effective challenge.

Despite its clear inapplicability to a program involving a broad array of subsidized private speakers and an intensely protected lawyer-client relationship, petitioners seek to invoke *Rust* on three levels. First, they argue that, as in *Rust*, government is free to subsidize one set of legal services without subsidizing other services. Second, they argue that, unlike the doctors in *Rust*, Legal Services lawyers are not absolutely forbidden to speak to clients about flaws in existing welfare law. Third, they argue that other lawyers remain free to advance the forbidden arguments. None of the three arguments can withstand First Amendment scrutiny.

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18. *See* 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1). Those professional standards explicitly prohibit a lawyer from allowing "a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." ABA Code of Prof. Respons., DR 5-107(B) (1976).

### 1. Congress's Ban on Challenging the Legal *Status Quo* Cannot be Defended as a Decision to Offer Differing Categories of Legal Service

Petitioners deny that Congress is engaging in forbidden viewpoint discrimination. They maintain instead that Congress has merely chosen to subsidize one type of legal "service" (help getting benefits *under* "existing law"), rather than another (help *challenging* "existing law"). But petitioners' argument reduces the First Amendment ban on viewpoint-discriminatory speech subsidies to a tautology. Virtually every viewpoint discriminatory allocation of a speech subsidy can be repackaged semantically as a decision to fund one "program" or "service" rather than another. For example, in *Rosenberger*, the University of Virginia argued that its student publication subsidy "program" was confined to secular speech, and that speech by religious publications was simply beyond the contours of the services subsidized by the government-defined "program." This Court rejected Virginia's effort to supplant analysis with labels, holding that the boundaries of a government "program" or "service" cannot be made coterminous with whatever speech restrictions the government wishes to impose on a subsidized speaker. Indeed, if petitioners' effort to repackage Congress's speech ban as a decision to fund one "service" but not another were accepted, the careful attempts of this Court to erect First Amendment limits in the area of subsidized speech would be reduced to an exercise in semantics.[19]

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19. The Court "ha[s] never countenanced such linguistic prestidigitation," *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988), repeatedly rejecting similar semantic efforts to repackage censorship as a decision to regulate something other than speech. *See, e.g., Button*, 371 U.S. at 429 ("[The government] cannot foreclose exercise of constitutional rights by mere labels.") (rejecting claim that "solicitation" of clients by public

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Moreover, unlike the usual funding decision, Congress's strategic allocation of subsidies in this case is openly designed to shield the government's viewpoint from effective challenge by the subsidized speaker. *See Schacht v. United States*, 398 U.S. 58 (1970) (invalidating statute permitting military uniforms to be worn only in expressive settings favorable to the government). As a quintessentially self-interested effort to shield the government's viewpoint from effective challenge by a subsidized speaker, the speech ban before the Court cannot be defended as a legitimate judgment about what type of government "service" to subsidize. When, as here, the government elects to define its subsidized "program" or "service" to include only speech that supports the government's viewpoint, while self-consciously forbidding speech that opposes it, the government violates the First Amendment whatever semantic disguise it chooses to deploy. *See Taxation with Representation*, 461 U.S. at 548 (allocation decisions may not aim at the suppression of disfavored ideas); *Rosenberger*, 515 U.S. at 825 (rejecting argument that ban on all religious speech is content, not viewpoint based).[20]

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interest lawyers is not a form of political and expressive association); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976) (rejecting argument that regulation of campaign spending concerns money, not speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (rejecting argument that flag-burning is an action, not speech); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (rejecting argument that regulation of demonstration is not regulation of speech).

20. Petitioners seek to analogize Congress's ban on challenging the legal *status quo* in a welfare case to the more absolute subject matter restrictions in the LSC statute, such as the long-standing ban on participating in school desegregation litigation or the newly imposed ban on appearing in reapportionment cases. The analogy breaks down, however, because, as the court below noted, the absolute subject matter bans do not require a lawyer to argue only one side of an issue. LSC Cert. Pet.-App. at 23a-24a. *See* discussion *infra* at Point I.C.3.

Finally, despite petitioners' insistence that Congress is funding a discrete, identifiable legal service, it is simply impossible to subdivide the practice of welfare law into watertight compartments that separate claims *under* existing law from claims *challenging* existing law, especially at the critical threshold of the initiation of the attorney-client relationship. In the first place, petitioners' attempt to characterize Congress's restriction as nothing more than a decision to subsidize arguments *under* "existing law," but to refrain from subsidizing arguments *challenging* "existing law" is incoherent and incapable of principled application because it ignores the single most important attribute of the American legal system — recognition that the Constitution and governing statutes are "existing law," fully capable of judicial enforcement in every case. *Marbury*, 5 U.S. (1 Cranch) at 178. When a Legal Services lawyer invokes the Constitution or a statute in support of an indigent client's legal rights, the lawyer is invoking "existing law" as surely as if the lawyer were invoking a newly minted administrative regulation.

Moreover, in the day-to-day practice of welfare law, it is often impossible for a Legal Services lawyer to know at the outset of an attorney-client relationship whether an indigent client who has been denied welfare benefits should seek relief under existing statutes or regulations, or must instead challenge existing law. Welfare clients simply do not appear on the doorstep color-coded by argument. For example, obtaining relief under so-called "existing law" often requires a Legal Services lawyer to challenge the constitutionality or statutory validity of the government's interpretation of an existing statute or regulation in order to invoke the familiar canon of construction that ambiguous statutes and regulations should be read to avoid constitutional questions. *See, e.g., Jones v. United States*, 120 S. Ct. 1904, 1911 (2000); *Ashwander v. TVA*, 297 U.S. 288, 341, 346

(1936) (Brandeis, J., concurring). But under Congress's prohibition, a Legal Services lawyer dare not invoke the principle of constitutional avoidance because it often leads to the invalidation of an existing welfare statute or regulation. *See, e.g., Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) (declaring law unconstitutional after rejecting saving statutory construction urged in the interest of constitutional avoidance); *Lowe v. SEC*, 472 U.S. 181, 211-36 (1985) (White, J., concurring) (same). Legal Services programs face draconian consequences if they should guess wrong about whether an argument is "under" existing law, or "challenges" existing law: complete loss of funding, leaving the program's other clients without counsel.[21] Legal Services lawyers are thus under enormous pressure to avoid any legal argument, such as the canon of constitutional avoidance, that places an existing welfare law in jeopardy, even though the lawyer's basic aim is to force the government to alter its incorrect interpretation of existing law, or its flawed approach to fact-finding.[22]

The wholly artificial line between arguments under existing law and arguments challenging existing law is rendered even more arbitrary and unpredictable by LSC's concession that welfare "policies" may be challenged, but not welfare "regulations" or "statutes." Br. of LSC at 7.[23]

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21. Indeed, the restriction places even more pressure on Legal Services lawyers who are caught between an obligation to obey the rule and professional qualms about splitting their client's claims — an option that carries with it a serious risk of claim preclusion.

22. That was precisely the plight of Ms. Velazquez's Bronx Legal Services lawyer who was seeking merely to have Ms. Velazquez restored to benefit status by arguing that a state regulation was both unconstitutional and unauthorized by statute if construed to permit termination without an opportunity to explain why compliance with the job search rules was impossible because of health.

23. 62 Fed. Reg. 30, 763, 30,765-66 (1997) (permitting challenges to "policies").

But it is often impossible to know, especially at the outset of an attorney-client relationship, whether a welfare denial was based on "policy," "regulation," "statute," or on some combination of the three. *See, e.g., Rist v. Missouri State Div. of Family Servs.*, 595 S.W.2d 783, 785 (Mo. Ct. App. 1980) (assuming without determining that provision of agency's Income Maintenance Manual on which agency relied "reflects the content of a regulation adopted by the Division of Family Services").[24] What begins as a challenge to a "policy" often evolves into a challenge to a "regulation," or a "statute" or, at least, a challenge to the current interpretation of a regulation or statute. *See, e.g., Baylor v. New Jersey Dep't of Human Servs.*, 561 A.2d 618 (N.J. App. Div. 1989) (although plaintiff originally believed and administrative law judge found that state welfare regulation entitled her to benefits, agency subsequently issued a differing interpretation of regulation giving rise to need to argue that agency's interpretation should be rejected in order to avoid constitutional issue).

Given the impossibility of deciding whether a particular client's needs fall on the permitted or forbidden side of an incomprehensible line, especially at the outset of an attorney-client relationship, the hopelessly incoherent congressional standard is flatly violative of the First Amendment. The imposition of such an inherently unpredictable and intrusive standard as the guidepost for crucial First Amendment

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24. For example, the Social Security Administration's policies are collected in the Program Operations Manual System (POMS), a document running to more than 1,000 pages designed to guide local officials. *See* 20 C.F.R. § 416.1002. As a matter of theory, a policy codified in the POMS must be based on an interpretation of existing statutes or regulations. Thus, any challenge to a "policy" codified in the POMS risks calling into question the regulation or statute upon which it is premised.

activity has been repeatedly rejected by this Court. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974); *City of Lakewood*, 486 U.S. 750; *Stromberg v. California*, 283 U.S. 359 (1931).[25]

### 2. Petitioners' Assertion That Congress's Restriction Does Not Materially Interfere With Free Speech Misidentifies Both the Primary Speaker and the Relevant Audience

Unable to mount a plausible argument that, as in *Rust*, the government is the true speaker, petitioners argue, instead, that no material interference with free speech is imposed by Congress's ban. Since, argue petitioners, a Legal Services lawyer is free to tell a client and the general public that, in the lawyer's opinion, existing welfare law is either unconstitutional or unauthorized by statute, the ban on advancing forbidden arguments in court does not impose a material burden on the lawyer's free speech rights. But the primary speaker in this case is not the subsidized lawyer. It is the indigent client for whom the lawyer is acting as a speech-proxy in addressing the Court. To the extent that Congress's ban prevents an indigent client from addressing legitimate arguments to the Court through counsel, it clearly impinges on a client's interest that this Court has repeatedly recognized is protected by the First Amendment. *See Button*, 371 U.S. at 429 ("litigation . . . is thus a form of political expression" that clients pursue through their lawyers); *Buckley v. American Constitutional Law Found.*, 525 U.S.

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25. Congress's restriction is rendered even less coherent by its temporal component. Pre-1996 law may be challenged. Post-1996 law may not be challenged. It is often impossible, however, to know at the outset of a case whether a given determination is based on pre- or post-1996 law. *See, e.g., Civetti v. Commissioner of Pub. Welfare*, 467 N.E.2d 101, 105 n.6, 106 (Mass. 1984) (agency notified plaintiff that it had terminated her benefits in reliance on older regulations, but trial court determined that it was newer regulations that were applicable to her case).

182, 192 nn.11-12 (1999) (restriction on person's ability to hire third party for assistance in pursuing political speech impinges on both parties' First Amendment rights); *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988) (same).

Moreover, petitioners completely misidentify the relevant speech market. It would be unavailing for a Legal Services lawyer to speak to a client or to the general public about the alleged unconstitutionality or statutory invalidity of a welfare statue or regulation. The relevant audience is an official who can do something about the problem — a judge or an administrative official. But Congress has carefully forbidden a Legal Services lawyer from addressing any member of that audience.[26] Petitioners simply ignore the fact that an American courtroom is a specialized example of a free market in ideas.[27] Within the bounds of relevance and

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26. Congress's effort to prevent subsidized lawyers from speaking to government officials about their client's problems may be characterized as a denial of the right to petition for redress of grievances, as well as a violation of the First Amendment's speech clause. The analysis would appear to be identical. *See McDonald v. Smith*, 472 U.S. 479 (1985).

27. Petitioners' observation that a courtroom is not a public forum hardly requires response. Neither a courtroom nor a university seminar are public fora in the sense that the general public may not freely participate in the discourse. Each is, however, a quintessential intellectual free market, fully protected by the First Amendment from government efforts to use law to skew the discourse in favor of its viewpoint. Moreover, regardless of how the Legal Services program or a courtroom would be classified under the First Amendment's public forum taxonomy, this Court has repeatedly stressed that even "the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." *Forbes*, 523 U.S. at 682. *See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 806 (1985); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992). Just this

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the rules of procedure, opposing lawyers are encouraged — indeed, mandated — to present all plausible legal and factual arguments to a neutral arbiter whose task it is to assess their relative merits and "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. The principal role of an American lawyer in such a microcosm of an intellectual free market is, quite literally, to serve as a client's "mouthpiece," translating a client's needs and hopes into the complex language of the law. Where private resources are inadequate to ensure the presence of counsel, the American legal system goes to extraordinary lengths to provide a subsidized lawyer to speak for an indigent litigant.[28] Congress and the states expend hundreds of millions of dollars each year to provide subsidized counsel to indigent persons because we understand that the integrity of our adversary system of justice turns on whether both sides are equally free to say all that needs to be said. Nothing could be more destructive of the crucial role that subsidized counsel plays in assuring the integrity of our adversary system of justice than a government effort to prevent federally funded lawyers from freely translating the needs of indigent litigants into otherwise appropriate legal arguments merely because, as here, government vigorously disagrees with — and apparently fears — those arguments.

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term in *Southworth*, the Court affirmed yet again this bedrock principle, holding that though "the [program at issue] [wa]s not a public forum in the traditional sense of the term," nonetheless "[t]he standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling." 120 S. Ct. at 1354.

28. *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972) (requiring appointed counsel in criminal cases involving potential loss of liberty).

### 3. Congress's Restriction Does Not Merely Deflect Indigent Clients to Other Lawyers Who Are Free to Raise the Forbidden Arguments

Petitioners argue that the ban on challenging the legal *status quo* in welfare cases is no different from the absolute bans on litigating in certain subject matter areas that exist in the LSC statute. Unlike every other subject matter restriction contained in the LSC statute, however, the ban on challenging "existing law" at issue in this case is openly premised on hostility toward legal arguments challenging a particular government viewpoint. It is, therefore, quintessentially self-interested, as well as viewpoint-discriminatory. As such, it is uniquely violative of the principle of viewpoint neutrality. Given the blatantly unconstitutional nature of such a self-interested, viewpoint discriminatory speech ban, the fact that other lawyers may be available to deliver the message, or that the silenced Legal Services lawyer is free to address other audiences, can never be sufficient to cure the First Amendment violation. As Justice Scalia noted in rejecting a similar argument in *California Democratic Party v. Jones*:

> In the end, however, the effect of [the challenged speech restriction] on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.

2000 WL 807188, at *7.[29]

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29. If, for example, Congress were to attempt to restrict a professor at a state-subsidized university to supporting the government's viewpoint, it would not be a defense that private universities exist where students may receive unfettered instruction. The fact that unfettered lawyers may exist is, similarly, no defense to placing unconstitutional speech restrictions on subsidized lawyers.

Moreover, petitioners' effort to defend the speech ban because it "merely" prevents a lawyer from entering court on a client's behalf in the first place turns on a wholly formalistic distinction between imposing a viewpoint discriminatory ban on a subsidized lawyer's argument in court (which petitioners appear to concede would be unlawful), and forbidding a subsidized lawyer to take a case in the first place solely because of the anti-government arguments the lawyer would be obliged to advance in court (which petitioners argue is legal). If government may not impose a self-interested, viewpoint-based speech restriction on a subsidized lawyer in court, why should it be able to prevent the subsidized lawyer from entering the courtroom in the first place solely on the basis of what the lawyer will say?

Finally, it is pure fantasy for petitioners to claim that all that is happening here is the deflection of an indigent welfare client to another lawyer who is free to make the necessary arguments.[30] As the plight of Carmen Velazquez makes clear, in most communities there are no alternatives to the local Legal Services program. Those underfunded alternatives that do exist in a few urban areas are overwhelmed. *See* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 19-21. And the alleged freedom to establish Legal Services affiliates to perform the forbidden legal tasks with non-federal funds is not a realistic alternative in most communities because it requires the immensely wasteful establishment of a "physically separate" facility that has proven to be beyond the means of virtually every Legal Services program. *See infra* n.41.

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30. LSC concedes that the so-called deflection to another lawyer will often take place long into the case when the need to raise forbidden arguments becomes apparent. Br. of LSC at 7 n.4.

Stripped of the semantic, formalistic and factually inaccurate defenses advanced by petitioners, Congress's attempt to bar Legal Services lawyers from challenging the legal *status quo* in welfare cases stands as starkly violative of the First Amendment. Without First Amendment protection, an indigent client would be in the untenable position of seeking help against the government from lawyers programmed to say and do only what the government wishes. The provision of such "tame" counsel is more consistent with totalitarianism than it is with our commitment to Equal Justice Under Law.[31]

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31. Congress's attempt to deprive Legal Services lawyers of the ability to challenge the legal *status quo* on behalf of an indigent client is also a blatant denial of equal protection of the laws in violation of the Fifth Amendment. *Cf. James v. Strange*, 407 U.S. 128 (1972) (invalidating recoupment statute that treated indigent defendant more harshly than other civil judgment debtors); *Tate v. Short*, 401 U.S. 395 (1971) (invalidating statute that imposed prison term only on indigents who could not afford fines). *See* Roth, *supra*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 144-56. If Congress were to provide that the burden of proof in civil cases varied with the income of the litigants, the statute could not survive constitutional scrutiny. In this case, Congress has provided that classic legal arguments readily available to any paying client will not be available to those indigent clients who must rely upon government-funded counsel. The net result is an irrational system of justice where the quality of legal representation is linked by law to a litigant's pocketbook. Such a result cannot survive any level of equal protection scrutiny. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (" '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .' ") (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

## II.

## PETITIONERS HAVE UNCONSTITUTIONALLY INTERFERED WITH THE USE OF NON-FEDERAL FUNDS TO ADVANCE "PROHIBITED" LEGAL ARGUMENTS ON BEHALF OF INDIGENT CLIENTS

The fact that Congress's welfare challenge restriction applies even to legal assistance that LSC fund recipients provide using non-federal funds is also offensive to the First Amendment under *League of Women Voters*, 468 U.S. 364, for two reasons.[32] First, Congress could not have been clearer about its intention to impose an absolute bar on subsidy recipients' use of non-federal funds to challenge the legal *status quo* in welfare cases. LSC's unauthorized regulation purporting to allow recipients to use non-federal funds to raise forbidden arguments by utilizing physically separate "affiliate" organizations, *see* 45 C.F.R. § 1610.8,[33] should be disregarded, and Congress's blanket ban on such use of non-federal funds should be declared invalid under *League of Women Voters*.

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32. The constitutionality of LSC's restrictions on the use of non-federal funds is properly before the Court. This Court's grant of certiorari on the validity of the welfare challenge provision necessarily encompasses the provision's validity as it applies to restrict the use of both federal and non-federal resources to advance forbidden arguments. SUP. CT. R. 14(1)(a) ("[T]he question presented will be deemed to comprise every subsidiary question fairly included within."). Moreover, the challenge to the constitutionality of Congress's effort to ban the use of non-federal funds provides an alternative and less intrusive ground on which to affirm the decision below. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."). The validity of applying the provision to non-federal funds was fully briefed and argued below.

33. LSC's regulations imposing the physical separation requirement are reproduced in LSC Cert. Pet.-App. at 131a-132a.

Second, even if LSC were authorized to promulgate a regulation permitting such use of non-federal funds, the regulation itself imposes an unconstitutional burden by requiring, without any plausible justification, that any lawyer seeking to advance forbidden arguments with non-federal funds must be housed in a wasteful and expensive "physically separate" facility.

### A. Congress Has Flatly Banned the Use of Non-Federal Funds to Advance Forbidden Legal Arguments in Welfare Cases

Congress could not have been clearer in banning recipients of Legal Services funds from engaging in a list of prohibited lawyering activities — including the advancement of the forbidden arguments at issue here — even when those prohibited lawyering activities are financed entirely from non-federal sources. The plain language of the 1996 appropriations rider states:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (. . . referred to . . . as a 'recipient') [that engages in any of the prohibited activities listed in section 504(a)].

Pub L. 104-134, § 504(a), 110 Stat. at 1321-53.

The 1996 Congress authorized local recipients of Legal Services funds to accept supplemental non-federal funds, but explicitly forbade them from using the non-federal funds for any purpose that was prohibited under section 504(a) or the 1974 LSC Act. *See id.* § 504(d)(2)(B), 110 Stat. at 1321-56. In addition, Congress required that formal notice be given to all non-federal donors to a Legal Services program that their gifts were subject to the restrictions imposed by § 504(a) and the 1974 LSC Act. *See id.* § 504(d)(1), 110 Stat. at 1321-56. Finally, the section-by-section analysis of the Senate bill that

became the 1996 Act expressly states: "The legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392, at 26 (1996).[34]

LSC initially read the 1996 restrictions consistently with the plain meaning of Congress's text. In the period immediately following the enactment of the restrictions, LSC promulgated two successive sets of implementing regulations recognizing that Congress had banned the use of non-federal funds to engage in prohibited lawyering activities. *See* 61 Fed. Reg. 63,749, 63,749 (1996) ("many of the new statutory conditions effectively restrict a recipient's non-LSC funds to the same degree as they restrict a recipient's LSC funds"); 61 Fed. Reg. 41,960, 41,962 (1996) ("A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504, unless such use is authorized by [provisions not relevant here]").

LSC's initial reading of the statute underwent a radical transformation in the face of litigation making it clear that Congress's attempt to bar the use of non-federal funds to engage in First Amendment activity was flatly unconstitutional under *League of Women Voters*. After two courts had explicitly ruled Congress's ban unconstitutional

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34. The 1996 Congress was obviously attempting to end the practice, in effect since 1974, of allowing local Legal Services offices to provide prohibited categories of representation using non-federal resources. Moreover, in mandating the blanket ban, Congress was legislating against the backdrop of LSC's long-standing accounting practice of treating "interrelated organizations" as one and the same in order to guard against recipients' manipulating corporate forms to evade requirements of the LSC Act. *See* 50 Fed. Reg. 49,276, 49,279-80 (1985) ("Funds held by an organization which controls, or is controlled by, or is subject to common control with, a recipient or subrecipient, are subject to the same restrictions as if the funds were held by the recipient or subrecipient.").

because it improperly sought to bar the use of non-federal funds,[35] and after the District Court below had expressed strong doubts about the ban's constitutionality at oral argument, LSC suddenly "discovered" an ambiguity in Congress's text that permitted the promulgation of yet a third, and then a fourth set of regulations purporting to authorize federally funded Legal Services programs to use non-federal funds to advance otherwise forbidden legal arguments — but only if the Legal Services lawyer advancing the forbidden argument was employed in a duplicative "independent" legal program housed in an enormously wasteful "physically separate" facility. 45 C.F.R. § 1610.8(a)(3).[36]

As respondents explain *infra*, the last-ditch attempt by LSC to salvage Congress's handiwork on the fly is itself violative of the First Amendment. It is not necessary, however, to consider whether LSC's effort to save the statute is itself a violation of the First Amendment because where, as here, Congress has unequivocally expressed an intention to condition federal funds on a waiver of the right to use non-federal funds to advance First Amendment activities, the unconstitutional statute may not be resuscitated by an administrative effort to rewrite it.[37]

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35. *Varshavsky v. Perales*, No. 40767/91 (App. at 6a-31a); *Legal Aid Soc'y of Haw.*, 961 F. Supp. 1402.

36. While the LSC regulation suggests that the degree of physical separation required "will be determined on a case-by-case basis," 45 C.F.R. § 1610.8(a)(3), LSC's practice demonstrates that the requirement is absolute. In the only known effort to establish a separately incorporated legal program to use non-federal funds for forbidden purposes without undergoing the expense of establishing a "physically separate" facility, LSC denied a request by Queens Legal Services to establish an affiliate that would share its physical space but in all other respects act as an independent program. *See* JA 82-95.

37. *Rust* teaches that when Congress wishes to authorize the use of separate programs to ensure that federal funds are not used for prohibited activities, Congress knows how to do so. In the Title X family

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The lower courts strained to uphold LSC's "new" reading of the statute under a combination of *Chevron* deference and the canon of constitutional avoidance. LSC Cert. Pet. – App. at 11a-13a; *id.* at 71a-75a. But, under *Chevron v. Natural Resources Defense Council*, courts "must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. 837, 843 n.9 (1984). Moreover, neither agencies nor courts are "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties." *Lowe*, 472 U.S. at 213 (White, J., concurring). *See Finley*, 524 U.S. at 590 (Scalia, J., concurring in judgment) ("[An Act of Congress] must be evaluated as written, rather than as distorted by the agency it was meant to control."); *Miller v. French*, 2000 WL 775572, at *8 (U.S. June 19, 2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks & citation omitted). Thus, LSC's current regulation is invalid because it "materially deviates from the legislative plan" that it purports to implement. *See Lowe*, 472 U.S. at 213.[38] Deprived of its unauthorized administrative camouflage, Congress's flat ban on the use of non-federal funds clearly violates the First Amendment.

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planning program at issue in *Rust*, Congress explicitly distinguished between "projects" and "grantees," and the restrictions challenged in *Rust* applied only to the former. *See* 500 U.S. at 196. There is no attempt to make such a distinction in the 1996 appropriations rider, which is explicitly aimed at LSC fund "recipients." In fact, the *Rust* Court noted that the term "recipient" is associated with efforts to impose unconstitutional conditions on the receipt of government funds. *Id.* LSC is, thus, in the legally untenable position of attempting to replicate the *Rust* regulations, but without the *Rust* statutory authorization.

38. It is, therefore, unnecessary to decide whether LSC, an independent corporation, is entitled to *Chevron* deference, or whether regulations that are so obviously designed for strategic litigation purposes are entitled to *Chevron* deference.

## B. LSC Has Placed Unconstitutionally Onerous Conditions on the Use of Non-Federal Funds

While LSC's "final" regulation is statutorily unauthorized and should be disregarded, even on its own terms the regulation violates the First Amendment because it imposes a significant economic burden on respondents' ability to use non-federal funds to advance forbidden legal arguments without any plausible government justification. *See Playboy*, 120 S. Ct. at 1886 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").[39] That LSC's requirement of maintaining physically separate facilities in order to use non-federal funds imposes a significant economic burden on the use of non-federal funds is beyond question. In order to use non-federal funds to advance a forbidden legal argument, financially strapped Legal Services programs must, at a minimum, duplicate library resources, word processing systems, and copying machines. And the economic burdens do not end with costly replication of physical equipment. Establishing an independent "physically separate" facility almost always entails a significant net increase in rent and utility payments,

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39. A private donor's effort to provide the poor with adequate legal representation by contributing funds to a local entity that also receives funds from LSC is unquestionably protected by the First Amendment. *Cf. Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (invalidating restrictions on charitable fund-raising); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 limit on contributions in referendum campaign); *Buckley v. Valeo*, 424 U.S. at 21 (recognizing that campaign contributions are a form of constitutionally protected speech and association). State and local governments are equally entitled under the Tenth Amendment to expend funds for such purposes without federal interference.

as well as supervisory, legal, and administrative costs.[40] Moreover, shuttling part-time lawyers between physically separate facilities based on the legal arguments they happen to be thinking about is an administrative nightmare worthy of a Marx Brothers skit. Not surprisingly, in the several years that the "physically separate" option has been open to Legal Services programs, counsel is aware of just two Legal Services programs that have established such "physically separate" affiliate offices.[41]

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40. LSC's physical separation requirement similarly forces other funders of legal services to waste their scarce resources by funding separate and duplicative programs. For example, the mission of *amicus* the Oregon State Bar, which distributes state court filing fees to finance legal services programs in that state, is to ensure that those programs "provide high quality representation to all low-income Oregonians in the most cost-effective and efficient manner possible," *see* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 29-30 — an aim that is in tension with the physicial separation requirement.

41. The two programs are Piedmont Legal Services in Virginia, and Legal Aid Services of Oregon. The District Court had directed LSC to provide respondents' counsel with continuing discovery of all applications, successful and unsuccessful, seeking to establish "physically separate" affiliates. LSC initially identified Piedmont Legal Services as having won approval of an affiliate relationship with the Charlottesville-Albemarle Legal Aid Society; respondents, through independent research, identified a second affiliate relationship, between Legal Aid Services of Oregon and the Oregon Law Center. Attorneys in these programs have described substantial costs incurred as a consequence of LSC's physical separation requirement. *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337, 351-54 (1997). LSC also identified Alaska Legal Services and a few other programs as having established affiliate relationships, however the Alaska affiliate appears to be not a legal services program, but rather a case referral service staffed by non-lawyers that attempts to refer restricted cases to pro bono counsel; the other programs identified by LSC similarly do not appear to be engaged in separate affiliate relationships with legal services programs. LSC has asserted that other

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In both *Taxation with Representation* and *League of Women Voters,* this Court stressed that Congress may not unduly interfere with the ability of a subsidized speaker to use non-federal funds to pursue First Amendment activities. In *Taxation with Representation*, the requirement of establishing a legally separate affiliate to utilize the non-federal funds was deemed an adequate mechanism, but the Court warned that imposition of additional controls beyond bookkeeping separation "would negate the saving effect of [the separate affiliate avenue]" and pose intolerable burdens on the "constitutional right [of such organizations] to speak and to petition the Government." 461 U.S. at 553.[42] Similarly, in *League of Women Voters*, this Court reiterated that the First Amendment guarantees recipients of restricted federal subsidies the right to use non-federal funds to fill gaps in congressional First Amendment funding. While allowing that such speech can be required to be channeled through a

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physically separate affiliate relationships may exist without LSC's consent or knowledge, *see* Letter from Stephen A. Wieder to David S. Udell (July 12, 2000) ("LSC does not maintain records concerning the number of such [affiliate] relationships that have been established"), however respondents' counsel have been unable independently to verify the existence of any additional such relationships. LSC's website states that it currently funds 237 programs.

42. The particular activity at issue in *Taxation with Representation* was lobbying. Congress had elected to permit certain tax-exempt veterans' groups to use tax deductible contributions (a form of federal subsidy) for lobbying, but not to allow other tax-exempt groups (those organized under section 501(c)(3) of the Internal Revenue Code (IRC)) to do so. In rejecting a challenge to this policy, this Court stressed the ease with which the complaining groups could form tax exempt affiliates under IRC section 501(c)(4) to use non-tax-deductible resources to lobby. The Court underscored that this separation requirement was merely "to show that tax deductible contributions are not used to pay for lobbying," 461 U.S. at 553, and warned that imposition of additional restrictions on the affiliates would amount to an unconstitutional condition. *See id.*

separate affiliate in order to ensure that no improper cost was borne by the restricted federal funds, the Court did not countenance any requirement of physical separation.[43] Thus, in both *Taxation with Representation* and *League of Women Voters*, the economic cost of separating federal from non-federal funds was minimal. In *Rust*, however, the government upped the ante by requiring that federally subsidized family planning clinics wishing to use non-federal funds to counsel patients about abortion must establish two physical facilities, one for federal purposes, and one for non-federal purposes, in order to ensure fiscal integrity, public understanding and program integrity. 500 U.S. at 180. This Court upheld the requirement. *Id.* at 198.

*Rust* is the only decision of this Court upholding a requirement that expensive, "physically separate" facilities be maintained in order to take advantage of the First Amendment rights recognized in *League of Women Voters*. *Rust* holds that where separate physical facilities are shown to be necessary to preserve the fiscal integrity of the federal program or to prevent public confusion about who sponsors a particular program, a requirement of physical separation may be justified, despite the economic burden it imposes on the use of non-federal funds. *Rust* does not stand, however, for the proposition that physical separation can be mandated, despite its burden on First Amendment rights, in the absence of a plausible government justification. No such justification is present in this case.

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43. At issue in *League of Women Voters* was a Federal Communications Commission rule barring public television stations that accepted federal subsidies from editorializing. The Court stressed that, absent creation of an avenue permitting station management to engage in editorial speech using the station broadcast equipment (*i.e.*, no physical separation) but financed with non-federal funds, the restriction violated the management's First Amendment right to speak using those non-federal resources. 468 U.S. at 400-01.

Petitioners overlook three fundamental distinctions between this case and *Rust*. First, unlike *Rust*, the District Court explicitly found that it was unnecessary to require a "physical separate" facility to ensure that federal LSC funds are not used to subsidize restricted activities. The District Court found (and petitioners have never challenged this finding) that the long-standing requirement that Legal Services lawyers maintain careful time records, coupled with a requirement of accurate accounting principles covering both fixed and variable costs, would ensure that federal funds are not used to subsidize forbidden activities. *See* LSC Cert. Pet.-App. at 73a ("[T]here would be no need to restrict the use of non-LSC funds at all" if LSC merely sought to ensure proper use of federal funds) (985 F. Supp. at 339).

Instead, the courts below found that the regulations' separation requirement was intended by LSC to prevent public confusion over whether the federal government was "endorsing" the activities of Legal Services lawyers. However, unlike *Rust*, there is no risk at all that the public will confuse federal government funding of litigation against itself with federal endorsement. The only possible justification for a physical separation requirement arises where (as in *Rust*) a government speaker desires to distinguish its own speech from the speech of private parties communicating messages that the government speaker does not endorse. But in programs where the government is not the "speaker," this concern dissolves into nothing more than government concern about perceived "endorsement." This Court has repeatedly evinced a healthy skepticism when fear of government endorsement is deployed as an excuse for censorship.[44] Indeed, the Court flatly rejected precisely such concerns of perceived endorsement in *Rosenberger*, 515 U.S. at 841-42.

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44. *See*, e.g., *Capitol Square Review & Advisory Bd.*, 515 U.S. at 769; *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 655 (1994); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

Moreover, the unsubsidized activity at issue in this case — suing the government because it has allegedly acted unlawfully — loudly proclaims that the government disagrees with it. A plausible risk of confusion over federal endorsement can hardly exist when Legal Services lawyers are actually suing the government. *Cf. Polk County*, 454 U.S. at 321-22 & n.13 (holding that public defenders could not be regarded as acting under color of state law, when they are adversaries of the state).

Finally, unlike *Rust*, there is no substantive tension between the subsidized and non-subsidized activities at issue in this case. In *Rust*, the two activities were mutually inconsistent. In the government's eyes at least, discussion of abortion in *Rust* actually negated the government's preferred approach to family planning. In this case, however the non-subsidized activity is merely a logical extension of the subsidized activity. Indeed, unlike *Rust*, the non-subsidized activity in this case actually complements and enriches the subsidized activity. *Cf. Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part & concurring in judgment) (federal policy should preempt others only where policies are "irreconcilable" and conflict is unavoidable, not "hypothetical or potential").

Unlike *Rust*, therefore, petitioners are unable to assert a single plausible justification for conditioning the use of non-federal funds on the burdensome physical separation requirement. Under traditional First Amendment analysis, such an onerous burden on First Amendment activities must: (1) advance an extremely important governmental interest, *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (finding an asserted interest valid but not compelling); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Schneider v. State*, 308 U.S. 147 (1939); (2) be no more extensive than necessary to advance the government's interest, *see Playboy*,

120 S. Ct. at 1886; *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); and (3) refrain from vesting government officials with undue discretion over the right to engage in First Amendment activities, *see City of Lakewood*, 486 U.S. at 771; *Shuttlesworth*, 394 U.S. at 153. LSC's final regulations fail all three tests.

Since the physical separation requirement is supported by no significant government justification; goes farther than necessary to meet the only legitimate justification — ensuring that government funds are not used for unauthorized purposes; and vests total discretion in LSC to implement the requirement, *see* 45 C.F.R. § 1610.8(a)(3) (degree of physical separation required "will be determined on a case-by-case basis"), no basis exists for the imposition of a severe economic burden on the use of non-federal funds to provide a full spectrum of legal representation to the poor.[45]

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45. Petitioners mischaracterize respondents' challenge to LSC's regulation as a "facial" challenge. *See, e.g.*, Br. of U.S. at 29. In fact, each respondent argues that the challenged restrictions are invalid as applied to her, and seeks to raise her own rights, not the rights of third persons. *Compare City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."). Ms. Velazquez lost her Legal Services lawyer (and her welfare benefits) because a Bronx Legal Services lawyer was not permitted to use available federal and non-federal resources to advance a forbidden argument on her behalf. Each LSC lawyer-respondent practices under an unconstitutional disability every day, barred from raising forbidden arguments. And each donor-respondent challenges the unjustifiable economic burden that LSC's restrictions impose on their respective donations. The Court below ruled that despite the classic "as applied" nature of respondents' challenge, the constitutionality of the LSC regulation requiring separate physical facilities should not be decided in the absence of a program-by-program showing that it is unduly burdensome. LSC Cert. Pet.-App. at 19a-20a. With respect, such an approach ignores settled First Amendment

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## III.

## CONGRESS MAY NOT INTERFERE WITH THE DECISIONAL AUTONOMY OF THE JUDICIARY BY PREVENTING LEGAL SERVICES LAWYERS FROM ADVANCING DISFAVORED LEGAL ARGUMENTS

As early as *Marbury v. Madison*, this Court made clear that Congress cannot do what it did here: authorize Legal Services lawyers to help implement welfare laws by representing indigent litigants in court, and simultaneously forbid them from arguing that the new rules are invalid. In that case, the Court asked, "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect?" 5 U.S. (1 Cranch) at 178. Declaring this hypothetical

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precedent holding that where a government regulation imposes a significant economic burden on protected speech, the government must, as a threshold matter, demonstrate an interest of sufficient magnitude to justify the burden. *See, e.g., Playboy*, 120 S. Ct. at 1886; *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Colorado Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Until the government proffers such an interest, it is plain error to require a speaker to demonstrate an undue burden. Moreover, regardless of the resources available to a particular Legal Services program, it is *always* the case that the physical separation requirement imposes a wasteful and constitutionally unjustifiable burden. Finally, even if this case were a facial challenge where plaintiffs sought to assert the rights of third-parties (which it is not), and even if plaintiffs' claims hinged (which they do not) on showing that most programs simply cannot afford to establish physically separate affiliates, it would make no difference. "To prevail [on a facial challenge], respondents [need only] demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Finley*, 524 U.S. at 580. *See Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (statute facially invalid as "substantial obstacle" to exercise of right in "large fraction" of cases). This standard is far exceeded where, as here, virtually no Legal Services programs have succeeded in establishing and maintaining physically separate affiliates.

to be "an absurdity too gross to be insisted on," Chief Justice Marshall ruled that the judicial department must have the power to determine "which of these conflicting rules governs the case." *Id.* Ever since, this Court has repeatedly recognized that fundamental principles of separation of powers preclude the political branches from tampering with judicial autonomy.[46] For example, in *United States v. Klein*, 80 U.S. (13 Wall.) 128, a litigant sought relief in a federal court in connection with assets that had been seized and sold as rebel property by agents of the federal government during the Civil War. In support of his application to be relieved from the consequences of the seizure, the litigant proffered a Presidential pardon as evidence of loyalty to the United States. Congress thereupon enacted a statute forbidding the courts from viewing a Presidential pardon as evidence of loyalty, directing, instead, that Article III judges view a Presidential pardon as evidence of disloyal activity. *Compare United States v. Padelford*, 76 U.S. (9 Wall.) 531, 442-43 (1869) (ruling that Presidential pardons neutralized prior acts of disloyalty). In *Klein*, this Court invalidated the statute, holding that Congress was without power to attempt to control the decisional processes of an Article III judge. 80 U.S. (13 Wall.) at 145-47.

Similarly, in *Dickerson v. United States*, this Court held that 18 U.S.C. § 3501 constituted an impermissible congressional attempt to "legislatively supersede our decisions interpreting and applying the Constitution." 2000 WL 807223, at *6. *See also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act on similar grounds). Taken together,

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46. The adjudicatory autonomy of Article III Courts is protected by fundamental principles of separation of powers, as well as the Due Process Clause of the Fifth Amendment. The adjudicatory autonomy of state courts is protected against federal encroachment by the Tenth Amendment and the Due Process Clause of the Fourteenth Amendment. The protections are functionally identical.

*Marbury*, *Klein* and *Dickerson* stand for an important principle: Congress may not seek to influence the outcome of pending cases by dictating the decisional process, superseding this Court's constitutional jurisprudence or, as here, manipulating the result by controlling the flow of information and argument to the courts.

Petitioners argue that Congress's ban does not interfere with the judiciary because other, non-federally funded lawyers are available to advance arguments challenging the legal *status quo*. But not only is such counsel simply non-existent in many states, *see* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-25, but, in the real world, the practice of law is not amenable to such arbitrary compartmentalization, *see* discussion *supra* pages 24-26. Moreover, even if non-federally funded lawyers were available in larger numbers, their existence would not render Congress's restriction constitutional. If, for example, Congress, motivated by a desire to shield its legislation from challenge, provided that one half of all lawyers were forbidden to raise constitutional arguments in court, the fact that the other half remained free to do so would not alter the reality that the flow of argument and information to the judiciary in particular cases had been materially impeded. In this case, Congress has taken 95 percent of the available lawyers for poor Americans "out of the game" in an unalloyed effort to shield its legal viewpoints from challenge. To argue that the judiciary is nonetheless unaffected because the few remaining available lawyers are still free to raise forbidden constitutional arguments in other cases borders on the absurd.

## IV.

## THE TEXT OF THE 1974 LSC ACT SHOULD BE READ HARMONIOUSLY WITH THE 1996 APPROPRIATIONS RIDER TO PERMIT A LEGAL SERVICES LAWYER TO ADVANCE FORBIDDEN ARGUMENTS WHEN NECESSARY TO AVOID THE POSSIBLE COMMISSION OF AN ETHICAL VIOLATION

The serious constitutional issues raised in this case can be ameliorated, if not entirely avoided, by a proper reading of the relationship between the text of the LSC Act of 1974 and the 1996 appropriations rider before this Court. The 1996 rider authorizes Legal Services lawyers to represent indigent litigants in welfare cases, but purports to forbid the lawyers from challenging the constitutionality or the statutory legality of any welfare reform statute or regulation. Such a prohibition is in clear tension with the "high standards of the legal profession" and "protection of the adversary process from any impairment" repeatedly mandated of Legal Services lawyers by the text of the 1974 Act. *See* 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1) (reproduced *infra* in App. at 1a-2a.).

Petitioners urge two unsatisfactory ways of resolving this tension. First, they argue that the 1996 appropriations rider need not be in tension with a commitment to the highest standards of legal ethics because in order to steer clear of any case in which the 1996 prohibition would raise ethical problems, Legal Services lawyers may refer the client to another lawyer who is not subject to the restrictions. But, as respondents have demonstrated, such an approach is premised on two unsupportable assumptions: (1) that non-LSC-funded lawyers are routinely available to provide effective representation to indigent clients; and (2) that the necessity of raising a forbidden argument will always be evident at the initiation of the attorney-client relationship. As Ms. Velazquez's experience demonstrates, in most communities

in the United States, if a Legal Services lawyer is unable to accept a welfare case because the 1996 restrictions render it impossible to do so, the indigent client has nowhere else to go. *See* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-25. That in itself poses an intractable ethical dilemma: Should the Legal Services lawyer accept the client and do the best that can be done under the existing restrictions? Should the Legal Services lawyer decline to accept the client, knowing that there is nowhere else to turn? Or should the Legal Services lawyer accept the client, ignore the restrictions, and risk the cessation of federal funding, thus jeopardizing the existence of counsel for other indigent clients served by the program? Suffice it to say that there is no easy answer to such an ethical dilemma.[47]

Petitioners' second suggested method of resolving the tension is even less acceptable. Since, argue petitioners, the 1996 appropriations rider is undeniably later in time than the 1974 ethical mandates in the body of the statute, the 1996 restrictions must override any ethical dilemmas, requiring Legal Services lawyers to act in tension with, if not in direct contravention of, "the high standards of the profession." But such a wooden application of the last-in-time doctrine is a wholly inappropriate way to read the complex interplay between the basic provisions of a congressional statute and subsequent restrictions imposed by the appropriations rider.

A far preferable way to resolve the tension is to ask whether the appropriations rider manifests an unmistakable intention to override a fundamental precept of the original statute. If it does, that intention must, of course, be respected,

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47. While an American Bar Association ethics opinion offers guidance for attorneys facing this ethical dilemma, *see* ABA Comm. on Ethics and Prof. Resp., Formal Op. 96-399 (1996), the opinion assumes that this collision is inevitable. Its authors would readily agree that a statutory construction enabling lawyers to avoid facing this dilemma would be vastly preferable.

despite the highly undesirable practice of using appropriations riders to enact substantive legislation. Where, however, as here, Congress does not manifest such an unmistakable intention, the two provisions should be read together in an effort to give meaning to both exercises of congressional will. In the absence of an explicit congressional desire to mandate activity that is, at a minimum, in tension with traditional ethical norms,[48] it is simply wrong to ascribe to Congress such an intention. *Traynor v. Turnage*, 485 U.S. 535, 547-49 (1988) (where statutory policy is long-standing, Court is loathe to infer congressional intent to repeal unless unmistakably clear). Instead, the interplay between the two provisions should be read to require Legal Services lawyers to attempt to avoid making the forbidden arguments by shifting the case to substitute counsel, if possible; but to recognize a narrow "ethical override" permitting Legal Services lawyers to advance the forbidden arguments when no ethically acceptable alternative exists. Such a reading is consistent with both the canon of constitutional avoidance, and with this Court's precedents construing the effect of appropriations riders on statutory text. *See TVA v. Hill*, 437 U.S. 153, 190 (1978).

## CONCLUSION

For the above-cited reasons, the decision of the United States Court of Appeals for the Second Circuit on the issue before the Court should be affirmed.

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48. Elsewhere in the rider, where Congress intended to override other conflicting provisions of the 1974 Act, it stated so expressly. *See, e.g.*, Pub. L. No. 104-134, §§ 504(a)(10)(C), 509(h) ("Notwithstanding section . . .").

Respectfully submitted,

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# APPENDIX

## APPENDIX A — RELEVANT STATUTES

1. Legal Services Corporation Act of 1974, as amended, Pub. L. No. 93-355, § 1001(6), 42 U.S.C. § 2996, provides in relevant part:

> Congressional findings and declaration of purpose
>
> The Congress finds and declares that —
>
> * * *
>
> (6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.
>
> * * *

2. Legal Services Corporation Act of 1974, as amended, Pub. L. No. 93-355, § 1006(a)(3), 42 U.S.C. § 2996e(b), provides in relevant part:

> (3) The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such

jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

* * *

3. Legal Services Corporation Act of 1974, as amended, Pub. L. No., 93-355, § 1007(a)(1), 42 U.S.C. § 2996f, provides in relevant part:

Grants and contracts.

(a) Requisites

With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall —

(1) insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients.

* * *

**APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE-OPELOUSAS DIVISION IN *DUGAS, et al. v. HOFFPAUIR, et al.*, CIVIL ACTION NO. 6:93-1699, DATED AND FILED OCTOBER 24, 1996**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF LOUISIANA**
**LAFAYETTE-OPELOUSAS DIVISION**

Civil Action No. 6:93-1699

Judge Tucker L. Melançon
Magistrate Judge Mildred E. Methvin

Vicki Dugas, et al

versus

Kay Hoffpauir, et al

**MEMORANDUM ORDER**

A ruling was entered on February 14, 1996 granting the plaintiffs' motion for class action certification. On July 10, 1996, attorneys for the plaintiffs moved to withdraw as counsel of record. A telephone conference was conducted by this Court on July 31, 1996, at which time the Court denied the motion to withdraw based on the condition that the matter be stayed until September 30, 1996, or until new counsel enrolls; that the attorneys addressed in the motion be allowed to withdraw on September 30, 1996; and that if new counsel for the plaintiffs did not enroll by September 30, 1996, the

remaining attorneys were to inform the Court of their ability to adequately represent the class.

A supplemental motion for named attorneys for plaintiffs to withdraw as counsel of record was filed on August 26, 1996. Based on the representation in that motion that the attorneys from the Legal Services Corporation would lose their federal funding if they continued as counsel of record and that the attorneys, although withdrawn, would continue to seek counsel to represent the plaintiffs by the September 30, 1996 deadline, the Court granted the motion on August 28, 1996.

On September 30, 1996, the attorneys for the plaintiffs filed a motion to extend the time in which to enroll new counsel. The Court denied that motion on October 2, 1996, and gave the remaining counsel for plaintiffs until noon on October 7, 1996, to inform the Court of their ability to adequately represent the class. As requested, the remaining counsel for the plaintiffs notified the Court that they could not adequately represent the entire class.

Based on representation made to the Court by Ms. Esther Lardent of the American Bar Association Law Firm Pro Bono Project, that law firms could represent the entire class has been contacted and expressed interest in taking the case, the Court granted the plaintiffs an additional fourteen days in which to enroll counsel that could adequately represent the entire class on October 9, 1996.

The plaintiffs having failed to enroll additional counsel, and based on the representations of remaining counsel for

the plaintiffs that present counsel is unable to adequately represent the class,

IT IS ORDERED that the class is decertified.

Thus done and signed this 2 day of October, 1996, at Monroe, Louisiana.

/S/
Tucker L. Melançon
United States District Judge

**APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK IN *VARSHAVSKY, et al. v. GELLER, et al.*, INDEX NO. 40767/91, DATED AND FILED DECEMBER 24, 1996**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 40767/91

BASYA VARSHAVSKY, BARBARA SCOTT, JANE DOE, and EMILY HEMMERLING on behalf of themselves and all others similarly situated,

Plaintiffs,

– against –

ESTELLE GELLER, SYLVIA LEWIS and FLORENCE FINK, ANNA GRZESLO, DONALD KELLER, THOMASINA WHEELER, DOROTHEA PERLEY, DOROTHY NAZANITZKY and AGNES TRINKWALDER, on behalf of themselves and all others similarly situated,

Intervenors,

– against –

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and MARK LACIVITA, as Acting Asst. Director of New York State Department of Social Services Office of Fair Hearing Administration,

Defendants.

*Appendix C*

Beverly S. Cohen, J.

This motion brings up for review federal statutes passed this year which are directed to the activities of the Legal Services Corporation established by Congress to provide legal services for the poor. The federal statutes challenged are part of the recent Congressional efforts to trim the federal deficit by cutting government spending, with the burden falling in this instance on those who can least afford it and those who represent them.

At issue are new federal restrictions placed on the Legal Services Corporation ("LSC") that mandated, as a condition for continued federal funding, the withdrawal of their attorneys from all class action suits by August 1, 1996. The new restrictions apply to all recipients of LSC funds, including plaintiffs' attorneys in this class action, Legal Services for the Elderly ("LSE"). LSE represents the indigent, elderly population of New York City and receives one-third of its funding from LSC. LSE receives two thirds of its funds from non-federal sources; New York State and private donors. LSE's failure to abide by the new restrictions would result in the withdrawal of federal funds not only from LSE, but from its parent office, Legal Services of New York City as well.[1]

The statutes do not restrict merely the right to use federal funds to engage in class actions and other specified activities, such as litigation concerning welfare benefits, prisoners'

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1. The United States Department of Justice has been notified of this motion, but has declined to take a position or to submit any papers.

rights, the census and abortions. They go much further. They prohibit recipients of federal funds from using private, state or local donations to engage in these activities. And they prohibit recipients from transferring their non-federal funds to any person or entity who does not abide by the same restrictions.

Valerie Bogart, Esq., a staff attorney from LSE, moves conditionally for leave to withdraw as counsel for the certified plaintiff class pursuant to C.P.L.R. Section 321, and/or asks for a temporary order clarifying her status as class counsel. The motion is conditional because Ms. Bogart wishes the court to decide whether her withdrawal is required under the Consolidated Rescissions and Appropriations Act of 1996, Pub. Law 104-134, 110 U.S. Stat. 1321 ("the 1996 Act") and its 1997 successor, Pub. Law 104-208, 110 Stat. 3009 ("the 1997 Act," the 1996 Act and the 1997 Act will be collectively referred to as "the Acts") and the rules promulgated thereunder by the LSC; whether her withdrawal is permissible under the New York State Code of Professional Responsibility; or whether the Acts and Rules are unenforceable because they violate the United States Constitution. Ms. Bogart wishes to remain as class counsel if the court finds that her withdrawal is unnecessary or unethical, or if the Acts and Rules violate the Constitution. Thus, this court must decide whether the ban on participation by LSC and its recipients in class actions, even where supported by non-federal funds, is constitutional.

Since its commencement in 1991, Ms. Bogart has served as lead counsel in this class action challenging the New York State Department of Social Services's abolition of its

In-Home Administrative Hearing Program. That program was closely tailored to serve the needs of those elderly homebound persons who were too disabled to travel to the departmental office to attend their benefits hearings. After class certification in 1991, this court entered a preliminary injunction in 1992, requiring defendants to provide initial telephone, and, if necessary, in-home hearings before terminating public assistance or Medicaid payments to homebound members of the plaintiff class. In 1994, the preliminary injunction was affirmed by the Appellate Division, First Department. [202 AD2d 155] At present, Ms. Bogart and her co-counsel Marc Cohan are engaged in monitoring Defendant's compliance with the preliminary injunction. No further legal proceedings have been held.

The 1996 Act provides that:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit. [Subsection 504(a)(7)]

The restrictions also prohibit the acceptance of non-federal funds for use in class actions:

> The Legal Services corporation shall not accept any non-Federal funds and no recipient shall accept funds from any source other than the corporation, unless the corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be

> expended for any purpose prohibited by the Legal Services Corporation Act or this title. [Subsection 504(d)(1)]

The LSC rules implementing the Act [45 CFR 1610 et seq., published 61 Fed. Reg 63749 and 45 CPR 1617 et seq, published in 61 Fed. Reg 63754, all published on December 2, 1996, hereinafter "the Rules"] extend these same restrictions even to third parties who receive non-LSC funds from LSC recipients. For example, were LSE to donate its non-federal funds to an independent organization or an affiliate that engages in class actions, LSE would lose its federal funding if the independent organization used those funds for class actions.

The rule entitled "Transfers of recipient funds" [45 CFR 1610.7 (published in 61 Fed. Reg. 63753, Dec. 2, 1996)] provides as follows:

> (a) For a transfer of LSC funds, the prohibitions and requirements referred to in this part . . . will apply both to the funds transferred and to the non-LSC funds of the person or entity.
>
> (b) For a transfer of non-LSC funds, the prohibitions and requirements referred to in this part . . . will apply to the funds transferred, but will not apply to the other non-LSC funds of the person or entity. . . .

"Non-LSC funds means any funds derived from a source other than the Corporation." [45 CFR 1610.2(d)] A "transfer"

is defined as "a transfer of a recipient's funds for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients. . . ." [45 CFR 1610.2(g)] An "[a]ctivity prohibited by or inconsistent with Section 504 means any activity prohibited or inconsistent with . . . (3) Section 504(a)(7) and 45 CFR part 1617 (Class Actions)" [45 CFR 1617.2(b)(3)]

Prior to the publication of the Rules in December of 1996, the LSC had promulgated interim rules on August 13, 1996. The interim rules provided as follows:

> (a) . . . *Class action* means a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure applicable in the court in which the action is filed.
>
> (b) *Initiating or participating in any class action* means any involvement at any stage of a class action *prior to an order granting relief* including acting as amicus curiae, co-counsel. . . . *It does not include non-adversarial monitoring of an order granting relief* or individual representation of a client seeking to obtain the benefit of relief ordered by the court. (emphasis added) [45 CFR 1617]

In an interim order dated August 1, 1996, this court directed Ms. Bogart to remain as counsel pending oral

argument of the motion. A second interim order, dated August 20, 1996, provided that because Ms. Bogart was engaged in non- adversarial monitoring of an order granting relief (the preliminary injunction) she was not participating in a class action as defined by LSC's interim rules. The second interim order further provided that Ms. Bogart was to remain as counsel for the plaintiff class absent a change in circumstances; that Ms. Bogart and the LSC should notify the court and all interested parties if there were a change of circumstances which might require Ms. Bogart to run afoul of the Acts and the interim rules; and that no adverse action was to be taken against Ms. Bogart, LSNY or LSE by LSC or Legal Services for New York City without notice to the court, to Ms. Bogart and her attorney, and an opportunity to respond. The second interim order directed that it be served on the Attorney General of the United States, and Richard Mathieu, Asst. New York State Attorney General, and set a schedule for the submission of opposition and additional supporting briefs.

As a result of Ms. Bogart's remaining as counsel, LSE received a letter, dated August 1, 1996, from LSNY stating that no LSC funds would be available to LSE after August 1, 1996 unless Ms. Bogart immediately withdrew.

In addition, on August 9, 1996, LSC acted to enforce the restrictions on class actions by making a "preliminary determination" that it would terminate the funding of LSNY on September 1, 1996, expressly based on the actions of the attorneys of LSE as class counsel in this and other class actions. As of December 1, 1996 no funding had been withdrawn.

*Appendix C*

On September 30, 1996, Congress enacted the 1997 Act containing identical restrictions on class actions. [Pub. Law 104-208, 110 Stat. 3009]

LSC'S final rule defining participation in a class action is effective January 1, 1997. [45 CFR 1617.2(b) published in Fed. Register on December 2, 1996 at 61 Fed. Reg. 63755, hereinafter referred to as "the Rule"] The Rule changes the definition of, and further limits, participation in a class action:

> (1) *Initiating or participating in any class action* means any involvement at any stage of a class action *prior to or after* an order granting relief. "Involvement" includes acting as amicus curiae, co-counsel or otherwise providing representation relating to a class action.
>
> (2) *Initiating or participating in any class action* does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial *activities*, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief. [emphasis supplied]

The discussion appearing in the Federal Register explains the new language in the Rule:

> The definition of "initiating or participating in any class action" in the interim rule was

> intended to clarify that any involvement in a class action is prohibited prior to an order granting relief. . . . In general the Board decided that it should state in the rule that all participation, whether before or after entry of an order, is prohibited; and the final rule reflects that change. In addition, the Board decided to address some of the specific issues addressed by the comments.
>
> One comment urged the deletion of "non-adversarial" before "monitoring," stating that any action, even an adversarial action, should be allowed once an order granting relief has been issued. The Board did not take this approach. Participation in adversarial actions, even after entry of an order, constitutes active participation in a class action and such involvement is not permitted under the law. The use of the term "non-adversarial" was intentional. The Corporation meant to prohibit any adversarial action after relief is granted. . . . Furthermore, the term "monitoring" is replaced with "activities" because its use seemed to imply a more active role for recipients than was intended. [61 Fed. Reg. 63754]

In a letter dated December 9, 1996, Ms. Bogart informed the court that the rules had been changed and stated that although the regulation still appears to be ambiguous, "one reading of the regulation would make it impossible for me to continue as counsel in the current status of the case, in which I am continuing to monitor compliance with the

preliminary injunction." The court received a letter from LSC in response, which argues that the Rule is no different from the interim rule.

The court agrees that some of Ms. Bogart's monitoring activities may be regarded as adversarial under the broader sweep of the Rule. Monitoring includes making judgments about and enforcing compliance. Under the interim rules, the court held that Ms. Bogart's activities were permissible because they were limited to monitoring. However, the Rule, and particularly the discussion that accompanied it, indicate that the word "activities" was substituted for "monitoring" because "monitoring" seemed to imply a more active role for recipients than was intended. Thus only activities more passive than monitoring are permissible under the present Rule. Moreover, the interim rule was limited to activities prior to an order granting relief, whereas the Rule applies to activities after an order granting relief.

Ms. Bogart reports that her current activities include 1) monitoring of the "scheduling of in-home hearings and compliance with 'aid continuing' directives for individual class members;" 2) meeting "with the State about improving client notices used in the home hearing program, procedures and time frames for completing telephone hearings;" and 3) representing "some individual class members in their individual and administrative claims." [Bogart Aff., dated July 24, 1996, paras. 5 & 7] Ms. Bogart and the State are presently negotiating which in-home hearing issues do not contain a factual dispute so that a second hearing need not be scheduled and reviewing all hearing decisions that the State places in this category. [Id. at para. 13]

*Appendix C*

Ms. Bogart's representation of individual clients might well be described as adversarial activity since it involves making legal judgments about the State's compliance and negotiations about how the State should comply. Ms. Bogart seeks the aid of the court to avoid imperiling all funding for LSE and its parent organization.

Accordingly, it is necessary to finally determine Ms. Bogart's motions prior to the effective date of the Rules.

Ms. Bogart's argument that her withdrawal would violate the New York State Code of Professional Responsibility must be resolved first. "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." [*Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 445]

The enabling statute which created the Legal Services Corporation, 42 U.S.C. 2996(6), provides that LSC shall not interfere with any attorney in honoring his/her professional responsibilities:

> attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

and

> The Corporation shall not, under any provision of this subchapter interfere with any attorney in

> carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this Subchapter are carried out in a manner consistent with attorneys' professional responsibility. [42 U.S.C. 2996e(b)(3)]

DR 2-110(C) provides that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse affect on the interests of the client. . . ."

Here, although Ms. Bogart's familiarity with this case would make it preferable for her to remain as counsel, it cannot be said that her withdrawal will be materially adverse to her clients. Ms. Bogart's co-counsel, Mr. Cohan, is ready and willing to take over. He is presently employed by The Center for Social Welfare Policy and Law (CSWP). This would allow him to remain as plaintiffs' counsel. (CSWP is not a recipient of LSC funds.) At oral argument it was conceded by Ms. Bogart's attorney that CSWP is in all respects able counsel to handle this matter. Neither can it be said that the restrictions are preventing Ms. Bogart from representing her client ethically because she cannot use the class action procedure. Ms. Bogart may withdraw so that counsel not subject to the restrictions can replace her.

*Appendix C*

The constitutional issues must be reached because the non-constitutional grounds supporting the motion would permit Ms. Bogart to withdraw.

In 1963, the Supreme Court held in *NAACP v. Button*, 371 US 415 (Brennan, J., writing for the majority), that citizens have a fundamental First Amendment right to engage in collective litigation to achieve political objectives:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.
>
> We need not in order to find constitutional protection for the kind of cooperative,

> organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activities. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'. . . .
>
> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association. [Id. at pp.429-431]

In *NAACP v. Button*, the NAACP sued to restrain the enforcement of Virginia statutes that prohibited advocacy of litigation against the State and solicitation of clients by attorneys. The activities of the NAACP were educational and lobbying activities designed to encourage groups of black parents and their children to hire NAACP lawyers to bring litigation to fight school segregation.

The Virginia statutes were held unenforceable because litigation for the purpose of having a political impact, and to accomplish political change, was a constitutionally

privileged form of political expression that overrode the statutory ban on solicitation.

Five years later, in *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, the court overturned an injunction prohibiting a union from employing an attorney to represent union members on the ground that the union was engaged in the unauthorized practice of law. The Court held that "the freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis." [Id. at 221-222] The Court found that it was irrelevant that *NAACP v. Button* involved political litigation, whereas the mine workers' litigation concerned private interests, holding that:

> The litigation in question is, of course, not bound up with political matters of acute social moment, as in Button, but the First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and free press are not confined to any field of human interest.' [Id. at 223, quoting *Thomas v. Collins*, 323 US 516, 531]

In 1971, the Supreme Court reaffirmed "the First Amendment principle that groups can unite to assert their

legal rights as effectively and economically as practicable." [*United Transportation Union v. State Bar of Michigan*, 401 US 576, 580]

Legislation that limits First Amendment freedoms is valid only when justified by a compelling state interest and only when the legislation is the "least restrictive alternative" for achieving the legislative objective.

> [The Supreme Court has] consistently held that only a compelling state interest in the regulation . . . can justify the limiting of First Amendment freedoms. [*NAACP v. Button*, supra at 438; see also *NAACP v. Alabama*, 357 US 449, 460-461 ("state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."]

In striking down the Virginia statutes the Supreme Court in *NAACP v. Button* adopted a "narrow specificity" test for statutes that touch on First Amendment rights. The Court held that it was not necessary to find that privileged conduct was actually interfered with, but only that the statute could be used to interfere.

> [I]t does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful . . . are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its member and lawyers is an ambiguous one, we will not presume that

> the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. [Id. at 432-433; see also *In re Primus*, 436 US 412]

Here there is no justification for the ban on the use of non-federal funds for class action litigation, compelling, substantial, or rational. The ostensible goal of saving money will not be accomplished by relegating the poor to less efficient individual actions for the same relief.

The legislative history of the restriction on class action litigation challenged here reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients and

anyone who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions. The class action restriction served to insure that the poor, if they were to have counsel at all, would be relegated to counsel rendered less effective, or as Ms. Bogart's counsel has described it, a lawyer fighting with one hand behind her back.

For example, Senator Phil Gramm described the purpose of the Acts as follows:

> These restrictions will ensure that scarce resources available for this purpose are not diverted to costly class action or impact litigation, or to activities which promote a particular political agenda. [Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Bill, 1996, S. Report, 104-139, 1995 WL 548950, p. 98][2]

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2. Representative Taylor of North Carolina also decried LSC's "political agenda." [Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 133] Congressman Ballenger of North Carolina complained that "Legal Services has long been involved in political advocacy with tax dollars. . . . After years of abuse, the Corporation has become a place for attorneys to put forth their liberal agenda. . . ." [Id. at 140] Mr. Doolittle from Louisiana lamented that "[Legal Services] is an advocacy group for liberal causes. . . ." [Id. at 159] Mr. Schiff from New Mexico asserted that "unpopular individuals have brought unpopular lawsuits through the Legal Aid Society." [Id. at 163] Representative Weldon of Florida criticized LSC for "left wing liberal advocacy." [Id. at 164]

(Cont'd)

Representative Dornan declared "It's time to defund the left. . . ." [Departments Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 185]

Under the Acts and the Rules, LSC recipients cannot accept donations unless they notify the donors that the money will be subject to the restrictions at issue here. The rule regarding transfers forbids recipient from transferring funds that never belonged to the federal government to a group with no connection to LSC, unless the transferee agrees to the restrictions.

This court does not need to reach the issue of whether the withdrawal of federal funding alone would violate the Constitution, as urged in Ms. Bogart's brief. The Acts and the Rules are invalid because they go beyond restricting the use of federal funds. This is not legislation that simply declines to fund a particular form of free expression. [See, e.g., *Rust v. Sullivan*, 500 US 173, pp. 196-197]. This legislation penalizes the LSC recipient for engaging in political expression that Congress disapproves of using funds wholly independent of the federal government, even if the recipient segregates those funds by giving them away.

In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1982), the Supreme Court held that Congress,

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(Cont'd)
Congressman Longley of Maine was encouraged because "we have made progress in the last year in terms of reforming [LSC] to get it out of the advocacy business." [Id. at 169-170] Mr. Radanovich from California described LSC as "a reckless and irresponsible agency that engages in politically motivated litigation." [Id. at 222]

by its legislation, could refuse to subsidize political expression so long as there were available means to engage in the expression without federal subsidies. Taxation With Representation (TWR) a non-profit corporation was organized under 26 USC 501(c)(3) of the Internal Revenue Code of 1954 ("Code"). Section 170(c)(2) of the Code allowed taxpayers who contributed to 501(c)(3) organizations to deduct the amount of their contributions from their federal income tax. However, 501(c)(3) organizations were not allowed to do extensive lobbying because the government did not want to subsidize that activity with tax deductible funds. TWR claimed that the ban on substantial lobbying by 501(c)(3) organizations was unconstitutional under the First Amendment.

The Court held that Congress had not infringed any First Amendment rights because the ban was not on lobbying, but on the use of public funds with which to do it. Although TWR could not use tax-deductible contributions for lobbying activities, it could use non-tax-deductible contributions for that purpose. This could be accomplished by creating two separate nonprofit organizations, one under 501(c)(3) of the Code contributions to which were tax-deductible and a second under 501(c)(4) to which contributions were not tax deductible.

Here, Congress has taken away the right that was held in *Regan* to save the Code's constitutionality. It has prohibited the setting up of separate entities to engage in political expression with the rule against transfer of non-federal funds.

*Appendix C*

In *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), the Supreme Court held that a federal statute was unconstitutional because it banned public television stations receiving federal funds from the Corporation for Public Broadcasting (CPB) from using their non-federal funds for editorializing, a restriction "specifically directed at a form of speech — namely the expression of editorial opinion — that lies at the heart of First Amendment protection." [*Id.* at 381]

In *League of Women Voters*, the law was invalidated because it did not permit federal funds to be segregated from the station's non-federal funds, and the result was that the ban reached beyond the program the government was funding to essentially "gag" the recipient station from engaging in constitutionally protected speech outside the subsidized program. Because the CPB grant consisted of only 1% of the station's total revenue, the station "[was] not able to segregate its activities according to the source of its funding. . . . [A]nd, more importantly, it [was] barred from using even wholly private funds to finance its editorial activity." [*Id.* at 400]

The Supreme Court held that if noncommercial educational broadcasting stations were permitted "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds," *id.*, then the federal ban would be valid under the reasoning of *Taxation With Representation*:

> Under such a statute, public broadcasting stations would be free, in the same way that the charitable

> organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. [*Id.*]

In *Rust v. Sullivan*, 500 US 173, 197-198, the Supreme Court explained why it upheld restrictions on federal funding in *Regan* and struck them down in *FCC*:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. . . .
>
> . . . The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. . . .
>
> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X

project in order to insure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.

*FCC*, *Regan* and *Rust* illustrate that Congress's behavior is not unconstitutional when it is aimed at limiting the specific activity or project it is funding. However, Congress is acting unconstitutionally when it attempts to control a recipient of its largesse when the recipient is engaged in constitutionally protected behavior and is neither engaged in the funded project, nor using federal funds.

The Acts and the Rules, like the inability to segregate funds in FCC, take away the right to engage in the prohibited activity outside of the federally funded program on pain of losing the grant. Congress has prohibited the creation of segregated entities or affiliates financed by a recipient's non-federal funds.

The Congressional intent to accomplish this result is apparent from the legislative history of the 1997 Act.

*Appendix C*

Mr. Burton of Indiana made the following speech:

> Congress prohibited Legal Services Corporation from doing certain things. Legal Services grantees are getting around these restrictions by forming new shell organizations to accept Federal grants so that the original groups can continue to pursue their liberal agenda with private funds. For example, the Philadelphia Legal Assistance Center and the Legal Aid Society of Santa Clara, in many cases the two organizations have the same board of directors, many of the same lawyers, and they share office space. They are two separate organizations in name only. They are just getting around the restrictions so they can do whatever they damn well please. [Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 144]

Representative Dornan from California made the following comment:

> Congress and past administrations have already attempted without success to place restrictions on LSC activities and behavior. Because money is fundible in the hands of private groups that have more than one funding source, LSC and its grantees have cleverly avoided these restrictions. . . . [Id. at 183]

Under the precedents of *League of Women Voters*, and *Button*, the Acts and the Rules are unconstitutional, as they

do not allow LSE to proceed with a class action, a constitutionally protected activity, even when using segregated or transferred non-federal funds.

The Acts and the Rules threaten our most cherished American First Amendment freedoms: freedom of association, freedom of speech and freedom to petition the government for redress of grievances. The rhetoric of budget reform is being used to thinly disguise an attack on basic freedoms. The restrictions could effectively bar LSE attorneys, their clients, their private and State donors, and those to whom LSE wishes to donate its non-federal funds from exercising their constitutionally protected right to freedom of association. That Congress may not do this has been explicitly stated in a long line of Supreme Court precedents that derived from attacks on desegregation and unions. At bottom, the legislation weakens the ability of poor people to stand up for their legal rights and to have an impact, when it may be their only effective method to petition the government for redress of grievances.

Accordingly, it is

ORDERED that the motion to withdraw is denied; and it is further

ORDERED that the Court declares that Pub.L. 104-134, 110 Stat. 1321, secs. 504(a)(7) and 504(d)(1), as reenacted by Pub. L. 104-208, 110 Stat. 3009, and 45 CFR parts 1610.3, 1610.7(a) and 1610.7(b), 1617.1 and 1617.3 are constitutionally invalid under the First Amendment to the United States Constitution.

*Appendix C*

This constitutes the decision and order of the court.

Dated: December 24, 1996

s/ Beverly S. Cohen
J.S.C.

(12) (11)

Nos. 99-603 and 99-960

Supreme Court, U.S.
FILED
AUG 17 2000
CLERK

IN THE

# Supreme Court of the United States

LEGAL SERVICES CORPORATION,

*Petitioner*,

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents*.

UNITED STATES OF AMERICA,

*Petitioner*,

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONER LEGAL SERVICES CORPORATION

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## Preliminary Statement[1]

Respondents face a heavy task on their facial challenge to the suit-for-benefits limitation: establishing that the government's decision not to subsidize lawsuits challenging existing welfare law violates welfare claimants' constitutional rights, in all instances and under any circumstances. To carry this burden, Respondents characterize the suit-for-benefits limitation as "totalitarian," supposedly "the most egregious violation of viewpoint neutrality to have come before the Court in recent years." Resp. Br. at 14, 32.

Respondents are simply wrong, however, when they brand the limitation a "self-interested" attempt by "the government" to insulate its own laws from constitutional challenge. The welfare laws are not the work of a monolithic "government." Although the suit-for-benefits limitation was enacted by Congress, the limitation removes funding from challenges to federal, state and local regulations, and state statutes, as well as Congress's own handiwork. Thus, the suit-for-benefits limitation does not protect Congress's viewpoint; it removes funding from cases that allege contradictions between laws promulgated by different political bodies. Congress has validly decided not to subsidize this discrete category of controversial, politicized, and, presumably, expensive cases.

In reply, Respondents insist that LSC lawyers cannot determine, at the outset of a case, whether to assert claims challenging existing law. Based on this assumption, Respondents hypothesize a series of ethical dilemmas that face LSC lawyers who discover a challenge to

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[1] We cite Respondents' brief as "Resp. Br.," and the briefs filed on behalf of the various *amici curiae* as "NYSBA Br.," "ACLU Br.," and "AJS Br." All case and record citations are as in LSC's initial brief ("LSC Br.").

existing law in the midst of an ongoing suit for benefits. Respondents thus contend that the limitation does not divert *cases* from the LSC program, but instead dictates the *arguments* LSC lawyers can make within cases, thereby disrupting lawyer-client relationships and muzzling speech in the courtroom.

This parade of horribles is disproven by a single fact: Since enactment of the suit-for-benefits limitation, LSC lawyers have handled thousands of benefits matters. Not one of these lawyers is before the Court alleging that a challenge to a welfare law materialized during a lawsuit, leaving the lawyer in an ethical quandary. This is not surprising; although the nature of a factual claim will often evolve during the litigation process, it should ordinarily be clear at the outset of a litigation whether to contend that the text of one law violates the provisions of some higher law.

At bottom, Respondents are contending that since no other lawyers are available to test the validity of welfare reform laws, the suit-for-benefits limitation effectively prevents *any* challenges to those laws. This contention is legally irrelevant; the government has no obligation to subsidize the exercise of a right, even if individuals would be unable to exercise that right without the government's assistance. This contention is also untenable; much of the cutting edge welfare litigation excluded from the LSC program will likely be handled by non-LSC legal aid organizations, private lawyers, and bar associations.

Granted, some welfare claimants may be unable to find a lawyer to assert challenges to the welfare laws. But other types of litigation for the indigent are also underfunded. Allocating the federal subsidy between these different types of cases is the prerogative of Congress, not of the lawyers whose work Congress subsidizes.

For these reasons, the court of appeals' invalidation of the suit-for-benefits limitation should be reversed.

## ARGUMENT

### A. The Suit-for-Benefits Limitation Does Not Exclude Welfare Claimants from a Public Forum Based on their Viewpoint

Although Respondents try to defend the court of appeals' analogy to *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), Respondents' reply papers suffer from the same three flaws as the court of appeals' opinion.

#### 1. The LSC Program Is Not a Public Forum

Rather than satisfy the crucial "public forum" element of *Rosenberger*, Respondents downplay it, contending that the government must be viewpoint-neutral whenever it subsidizes a private speaker's speech, rather than the government's own speech.[2] From this starting point, respondents claim that since LSC lawyers are independent of the government (and often adverse to it), they are private speakers whose speech must be subsidized regardless of viewpoint. Resp. Br. at 19-21; ACLU Br. at 9-22.

The touchstone in *Rosenberger* was not, however, the identity of the speaker (governmental or not), but the nature of the program created by the subsidy (public forum or not). *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (explaining *Rosenberger*:

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[2] Respondents also try to side-step the public forum element by contending that speakers cannot be excluded even from non-public fora on the basis of viewpoint. Resp. Br. at 28 n.27. The cited cases are not applicable to a selective subsidy, however; they involved direct restrictions on speech.

"by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints") and 598-99 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum. . . .") (Scalia, J., concurring). Moreover, the *Rosenberger* Court explicitly noted that although the doctors in *Rust v. Sullivan*, 500 U.S. 173 (1991) were "private speakers," the government could regulate their conduct within its services program. *Rosenberger*, 515 U.S. at 833 (distinguishing *Rust* by noting that "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program").

Similarly, although LSC lawyers are private speakers, the services they perform are part of a federal program. Since that program is not designed to promote expression, let alone the free expression of the public at large, it is not a public forum governed by the principle of viewpoint neutrality. In fact, the LSC program is "not a forum at all." *See Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 678-679 (1998).

Yet Respondents challenge the very notion of a governmental services program, contending that the distinction between a program for the promotion of speech and a program to deliver services is mere semantics. Resp. Br. at 22-23 and n.19. Although Respondents are correct that expression can come in many different forms, there is an obvious difference between a program to promote free and open expression and a program to deliver specific services to eligible individuals: If the government refuses, on the basis of viewpoint, to provide a speaker with a speech subsidy that is generally available to other speakers in a public forum, then the

government's action may have the effect of suppressing speech. If, however, the government merely limits the services offered in a defined program, the government is simply promoting one policy without also supporting a competing policy.

Even Respondents agree that the government is free to take a particular viewpoint when it promotes policy through expression *per se* (*e.g.*, when the FDA warns about the dangers of smoking (*Finley*, 524 U.S. at 610-611(Souter, J., dissenting))). Resp. Br. at 19 n.17. The government must have the same power to promote a particular policy through non-expressive means, including by subsidizing a program to provide services. In this context, the First Amendment simply has no relevance.[3]

### 2. The Suit-for-Benefits Limitation Does Not Discriminate Against Any Particular Viewpoint

Even if the LSC program were somehow a public forum, Respondents have not shown that anyone is excluded from it based on viewpoint. In our initial brief, we explained the deficiencies in the court of appeals' holding that the suit-for-benefits limitation is biased in favor of the status quo. In reply, Respondents recharac-

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[3] Alternatively, Respondents try to defend the court of appeals' holding that litigation is a public forum by analogizing litigation to a university. Resp. Br. at 27-30; ACLU Br. at 17-21. But Respondents do not address (let alone rebut) our point that the LSC program, not the litigation process, is the proper subject of the forum analysis. LSC Br. at 27-28. The analogy is, in any event, absurd; the courtroom is not part of a "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835. Thus, litigants' First Amendment rights are not comparable to those of a university, its professors, or its students. *Cf. Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 n.13 (1985) (litigants' First Amendment rights different from individuals' rights of political expression).

terize the limitation, claiming it operates in a "self-interested manner designed to insulate the government's own viewpoint about the validity of its laws from effective challenge by the subsidized speaker." Resp. Br. at 12-14.

But the "welfare laws" are a mosaic of federal, state and local law. They reflect the "viewpoints" of legislatures, judiciaries, and administrative agencies in all these political systems. *See* NYSBA Br. at 8-9. While Respondents focus on "challenges to existing law" alleging the unconstitutionality of a federal statute, these lawsuits more often contend that the federal statute which created a given welfare program trumps an inconsistent state or local law (or federal regulation) designed to implement that program. In such a case, the welfare claimant is not *challenging* Congress's viewpoint, but trying to *enforce* it.[4]

Thus, the suit-for-benefits limitation does not insulate Congress's viewpoint from challenge; it removes funding from a certain category of cases regardless of viewpoint: expensive, politicized "test cases" that could require a court to resolve alleged contradictions between laws promulgated by different jurisdictions. This categorical restriction is consistent with all the other restrictions in the LSC statute that are designed to steer the program clear of politics—none of which is viewpoint-based. Pet. App. at 20a-23a.

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[4] Carmen Velazquez's claim—that she was precluded from arguing that New York State law violated federal law (C.A.J.A. 278-79)—illustrates this point. So do many of the cases cited by Respondents. *E.g.*, *Sullivan v. Zebley*, 493 U.S. 521 (1990) (HHS regulation violated federal statute); *Blum v. Bacon*, 457 U.S. 132 (1982) (New York statute violated federal regulation); *King v. Smith*, 392 U.S. 309 (1968) (Alabama regulation violated Social Security Act); *McCoy v. Department of Health & Welfare*, 907 P.2d 110 (Idaho 1995) (Idaho regulation violated Title X).

### 3. Respondents Do Not Identify a Coherent Speaker for Purposes of the First Amendment

Finally, in response to LSC's argument that the court of appeals misidentified LSC lawyers as the relevant "speakers," Respondents concede that "the primary speaker in this case . . . is the indigent client for whom the lawyer is acting as a speech-proxy. . . ." Resp. Br. at 27.

Yet Respondents' brief repeatedly invokes the rights of LSC lawyers. For example, the brief includes a lengthy challenge to LSC's program integrity regulations. Resp. Br. at 33-44. Since these rules are designed to permit adequate alternative channels for grantees' affiliates to conduct prohibited unsubsidized activities, this challenge implicitly advocates the rights of lawyers, not clients. Respondents also suggest there is no constitutional distinction between regulating the speech of a lawyer in Court and "prevent[ing] the subsidized lawyer from entering the courtroom in the first place." Resp. Br. at 31. This rhetorical flourish contradicts Respondents' concession that the client is the one with the First Amendment rights, because the client is certainly not "prevented from entering the courtroom."

Respondents' inability to identify a coherent speaker further illustrates the inapplicability of free speech analysis to this case. The analogy to *Rosenberger* should be rejected.[5]

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[5] Respondents also ask the Court to reconsider its holding in *Rust*. Resp. Br. at 19 n.17. As we explained in our initial brief, however, the central issue in *Rust* was a restriction on the speech between the doctor and patient. LSC Br. at 17-18 and 23. Reconsidering that issue would have no bearing on the Court's resolution of the issue here, namely, the validity of a restriction purely on the services the lawyer can render. Thus, it would be inappropriate to reconsider *Rust* in this case.

### B. The Suit-For-Benefits Limitation Does Not Violate the Associational Rights of Welfare Claimants and LSC Lawyers

In addition to their free speech claim, Respondents contend that the suit-for-benefits limitation violates welfare claimants' freedom to associate with competent LSC counsel, because the limitation manipulates "the representational judgments made by a government-funded lawyer." Resp. Br. at 17. Respondents' primary allegation is that challenges to existing law will become apparent only after an LSC lawyer has initiated a benefits claim, putting the LSC lawyer in an ethical dilemma: either withdraw from an ongoing case, thereby prejudicing the subsidized claim, or forego the challenge to existing law, thereby precluding the unsubsidized claim. NYSBA Br. at 6-17.

Respondents' argument depends entirely on dictum in *Rust*, where this Court suggested that an "all encompassing" doctor-patient relationship might enjoy First Amendment protection from "significant impingement" by the government, even if the government subsidized that relationship. 500 U.S. at 200. While Respondents put great weight on these words, this Court rejected the claim, for reasons that are equally applicable to the claim at hand.

First, as the court of appeals held, "the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships . . . considered in *Rust*." Pet. App. (99- 603) at 14a. The LSC Act has always prohibited LSC lawyers from engaging in political activities or from handling certain categories of politicized cases within the LSC program. LSC Br. at 2-5. And LSC lawyers have an obligation to explain these restrictions to their potential clients at the outset of any representation. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-399 (1996) ("ABA

Op."). Thus, LSC clients cannot possibly believe they are hiring lawyers who are in a position to express all of their views, rather than render them specific services. As a consequence, LSC lawyers and clients do not have the kind of "expressive associational relationship" that was crucial to the holdings in *NAACP v. Button*, 371 U.S. 415 (1963), and its progeny. *See* Resp. Br. at 14-17.

Even if the relationship between an LSC lawyer and client were "all-encompassing," the suit-for-benefits limitation does not "significantly impinge" upon it. Certainly the suit-for-benefits limitation is nothing like the criminal and ethical sanctions considered in *Button* and its progeny, all of which *prohibited* relationships between clients and the unsubsidized private counsel of their choice. Moreover, in *Rust*, this Court held that forbidding a doctor to recommend abortion or to refer a patient to an abortion-provider did not significantly impinge upon the doctor-patient relationship. *Rust*, 500 U.S. at 192-95. Since the suit-for-benefits limitation does not include comparable restrictions on advice and referrals, it has even less impact on the lawyer-client relationship. In fact, the limitation does not affect ongoing relationships at all; it simply excludes certain cases from the federal program.

To overcome this crucial distinction from *Rust*, Respondents insist that "challenges to existing law" will generally not be apparent at the outset of representations, but will arise midstream, leaving LSC lawyers unable to raise certain arguments in lawsuits. While this contention may be superficially plausible, it cannot withstand scrutiny, particularly on this facial challenge.[6]

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[6] Respondents suggest that LSC has conceded that "the so-called deflection to another lawyer will often take place long into the case. . . ." Resp. Br. at 31 n.30 (citing LSC Br. at 7 n.4). LSC makes no such concession; Respondents are misreading our initial brief.

Since the suit-for-benefits limitations went into effect in August 1996, LSC-funded lawyers have handled more than 150,000 benefits claims, six thousand of which involved litigation.[7] Of these cases, Respondents have not identified a single LSC lawyer who learned, in the middle of a case, that she ought to amend a complaint to add a challenge to existing law.[8] LSC lawyers have obviously determined that thousands of cases could be handled ethically and competently under the limitation.

To overcome this single dispositive fact, Respondents manufacture a series of unsupportable claims:

- That challenges to existing law will arise as a result of new facts learned during discovery. Resp. Br. at 24-26; NYSBA Br. at 7-8. In fact, the claims excluded by the suit-for-benefits limitation are not fact-intensive, but turn on an argument that the text of a regulation or statute violates the text of some higher law.[9] Such

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[7] LSC lawyers have handled more than 500,000 "Income Maintenance" matters since August 1996. LSC has determined that about 150,000 of these matters involved welfare benefits of the sort covered by the suit-for-benefits limitation. *See* Legal Services Corporation, 1996 Facts at 12-13; Legal Services Corporation, 1997 Annual Report at 4; Legal Services Corporation, 1998 Fact Book and Program Information, at 12-13; Legal Services Corporation, Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress (April 2000) at 7. Of those matters, 6,039 were litigated to decision or settled during litigation.

[8] The lead Respondent, Carmen Velazquez, initiated her case *before* enactment of the suit-for-benefits limitation. C.A.J.A. 276-79.

[9] The cases cited by *amicus* NYSBA Br. at 26 n.11 illustrate this point. *E.g. Sullivan v. Zebley*, 493 U.S. 521 (1990) (HHS regulation violated federal statute); *Blum v. Bacon*, 457 U.S. 132 (1982) (New York statute violated federal regulation); *Califano v. Westcott*, 443 U.S. 76 (1979) (federal statute violated due process clause); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (New York City regulations violated due process clause); *Shapiro v. Thompson*, 394 U.S. 618

claims can be identified by an experienced benefits practitioner at the outset of the representation—as evidenced by the thousands of representations so far. Although that process may require some investigation prior to taking a case, lawyers must frequently gather certain facts to determine whether they can handle a potential new matter. This task does not violate either the First Amendment or lawyers' ethical duties. *See* ABA Op. ("Before accepting a new client a Legal Services Lawyer subject to LSC funding restrictions must inform the client about all of the restrictions . . . and must carefully screen the client to ensure that the representation will not endanger funding.").

- To bolster their contention that LSC lawyers cannot identify "challenges to existing law" at the outset of a representation, Respondents argue that the term "existing law" is too vague for consistent application. Resp. Br. at 24-27. But LSC's regulations explicitly define this term. *See* 45 C.F.R. § 1639.2 (1997 ). Respondents repeatedly fail to reckon with this definition.[10]

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(1969) (state and D.C. statutes violated due process clause); *King v. Smith*, 392 U.S. 309 (1968) (Alabama regulation violated Social Security Act); *McCoy v. Department of Health & Welfare*, 907 P.2d 110 (Idaho 1995) (Idaho regulation violated Title X).

[10] Respondents argue that because the Constitution itself is "existing law," it is meaningless to allow suits *under* "existing law" but to prohibit constitutional challenges to "existing law." Resp. Br. at 24. But the definition of "existing law" excludes constitutional law. *See* 45 C.F.R. § 1639.2(b) (1997). Similarly, although Respondents cite *Rist v. Missouri State Division of Family Services*, 595 S.W.2d 783, 785-86 (Mo. Ct. App. 1980), for the proposition that it is often impossible to determine whether an adverse welfare determination is based on "existing law" or mere "policy," the unpublished state policy in *Rist* clearly was not "existing law." *See* 45 C.F.R. § 1639.2(b) (1997).

- Finally, Respondents contend that claims challenging the fairness of an agency determination will not become apparent until after the LSC lawyer has already begun representing the client before the agency. NYSBA Br. at 8. If LSC lawyers determine that they must terminate the representation at this discrete point—after an agency decision but before any litigation has begun—the lawyer's withdrawal does not threaten the client with claim preclusion; it merely requires the client to find a new lawyer for the next phase of the representation. This is not a significant impingement of the lawyer-client relationship.

Even if these contentions were correct, however, and LSC lawyers sometimes discover challenges to existing law in the middle of cases, they will not be faced with the impossible dilemma posited by Respondents. There is no reason to believe that other legal aid organizations or *pro bono* lawyers will not handle these cases. *See infra*. at p. 15. LSC grantees can even create their own affiliates to litigate these matters. *See infra* at pp. 18-19. This court should not presume "prejudice" on this facial challenge.

In sum, Respondents have not established a "substantial probability" that the suit-for-benefits limitation will disrupt ongoing attorney-client relationships, or that any such disruption will work a "significant impingement" on the attorney-client relationship. Thus, LSC rejects Respondents' absurd allegation that it is intentionally requiring its lawyers "to act in tension with, if not in direct contravention of, 'the high standards of the profession.' " Resp. Br. at 48-50. There is nothing unethical about declining to accept a matter that is outside the LSC program. *See* ABA Op. ("A Legal Services Lawyer

is not obligated to find alternative counsel for a potential client who has been turned away."). Respondents' free association claim should be rejected.

### C. The Suit-for-Benefits Limitation Does Not Prevent Welfare Claimants from Challenging the Welfare Laws

Respondents also contend that LSC grantees are often the only lawyers available to challenge welfare reform laws, and that the suit-for-benefits restriction therefore "prevents an indigent client from addressing legitimate arguments . . . through counsel." Resp. Br. at 27; *see also* NYSBA Br. at 18-27. While Respondents press this point repeatedly, it is unclear whether they are trying to resurrect their Fifth Amendment "access to the courts" claims (Resp. Br. at 32 n.31)—which the district court rejected as "rather casual," Pet. App. (99-603) at 82a-83a, and Respondents abandoned on appeal—or make a First Amendment argument. Either way, the argument should be rejected.

In *Ortwein v. Schwab*, 410 U.S. 656 (1973), recipients of welfare benefits challenged a filing fee that effectively prevented them from bringing lawsuits to review agency decisions that reduced their benefits. This Court dismissed their due process claim, holding that since they had received all the pre-reduction process required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), they were not entitled to "an appellate system" to challenge the agency determinations in court. *Ortwein*, 410 U.S. at 659-60. This Court also dismissed the equal protection claim, holding that the filing fee satisfied the rational basis test applicable to a rule that does not include a "suspect classification." *Id.* at 660-61. Last, the Court summarily concluded that re-characterizing the claim under the First Amendment added nothing. *Id.* at 660 n.5 ("Our discussion of the Due Process Clause . . . demonstrates

that appellants' rights under the First Amendment have been fully satisfied.").

Similarly, in *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 316, 330 (1985), veterans challenged a statutory $10 maximum fee that could be paid to an attorney who represented a veteran seeking benefits for service-connected death or disability. This Court reversed a nationwide preliminary injunction against enforcement of the limitation, holding that plaintiffs' facial challenge did not make the "extraordinarily strong showing" necessary to prove they had been denied meaningful access to the courts in violation of the Due Process Clause. The Court also rejected the First Amendment claim, holding it had no "independent significance." *Id.* at 335. In fact, the Court questioned whether the First Amendment claim was appropriate at all, noting that "the constitutional analysis of a regulation that restricts core political speech . . . will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings. . . ." *Id.* at 335 n.13.

The suit-for-benefits limitation is far less burdensome than the provisions considered in *Ortwein* and *Walters*.[11] While those provisions actually created obstacles to the assertion of benefits claims, Respondents in this case allege that welfare claimants could not challenge the welfare laws with or without the suit-for-benefits limitation. Thus, if Congress had not created the LSC program in the first place, indigent welfare claimants would "have the same choices as if [the government] had chosen not to" create the program at all. *Webster v. Reproductive Health Services*, 492 U.S. 490, 509 (1989). This

[11] Although *Walters* involved veterans' benefits rather than welfare benefits, *Walters* is nevertheless instructive in that the Court denied a facial challenge to a limitation on claimants' ability to obtain lawyers to contest government benefits determinations.

is not a constitutional violation. *Rust*, 500 U.S. at 203 ("Petitioners contend . . . that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But . . . these Title X clients are in no worse position than if Congress had never enacted Title X.")

Finally, Respondents have not made the "extraordinarily strong showing" necessary to justify an injunction against enforcement of a federal statute. *Amicus* NYSBA contends that in 22 states, LSC funds constitute more than 50% of the total funding available for civil legal services for low-income individuals. NYSBA Br. at 20. Here the NYSBA essentially ignores *pro bono* service; law firms, bar associations, and private lawyers acting individually may well be interested in lawsuits that could vindicate the rights of thousands of welfare claimants. Other non-LSC organizations, such as the National Center on Poverty Law, are also filling the gap created by the congressional restrictions by hiring former LSC lawyers to engage in welfare-related "class action and individual cases with broad policy implications." *See* National Center on Poverty Law website, <http://*www.povertylaw.org/about ncls/whatwedo.htm*>. In fact, the NYSBA cites a handful of recent cases in which non-LSC lawyers successfully challenged welfare laws. *Id.* at 26-27. These cases are vivid proof that welfare reform litigation can and does take place notwithstanding the suit-for-benefits limitation.

From all the NYSBA's facts and figures, one stands out: No matter how this Court resolves the present case, the legal services available to meet the needs of the poor will be greatly insufficient. NYSBA Br. at 19. Invalidating the suit-for-benefits limitation will not alleviate that shortage. It will transfer control of the LSC program

from Congress, which decided to fund an apolitical benefits program, to LSC lawyers, some of whom want to participate in the contentious debate on welfare reform through their subsidized employment. But ultimately Congress has the power to define—or eliminate—the LSC program.[12]

### D. LSC's Program Integrity Regulations Do Not Violate LSC Grantees' First Amendment Rights

Finally, Respondents challenge LSC's program integrity regulations, claiming that overturning this limitation on the use of non-federal funds would provide a "less intrusive ground on which to affirm the decision below." Resp. Br. at 33 n.32. In fact, the challenge to the program integrity regulations is far more intrusive, because it would invalidate LSC's enforcement of a crucial element of all the provisions in the 1996 Act. Thus, the Court should reject Respondents' attempt to justify review of the program integrity regulations; this Court granted *certiorari* to review the court of appeals' invalidation of the suit-for-benefits limitation, not its approval of the program integrity regulations.

If the Court decides to hear this challenge, the program integrity regulations should be upheld. Although Respondents allege that the regulations cannot survive "strict scrutiny," the strict scrutiny cases cited by Respondents involved direct restrictions on First Amendment activity;[13] insofar as we are aware, this

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[12] Respondents' separation of powers argument is ironic when one considers that the lawyer-Respondents are trying to arrogate Congress's spending power to themselves.

[13] *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (prohibition on transmission of obscene/indecent communications); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (city ordinance banning certain signs); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (statute giving mayor unbridled discretion to prohibit news racks);

Court has never applied strict scrutiny in a selective subsidy case. *See, Regan v. Taxation with Representation*, 461 U.S. 540, 548-49 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right . . . is not subject to strict scrutiny.") (citations omitted).

Once the correct rational basis standard is applied, it is clear that the program integrity regulations serve two proper purposes. First, they prevent indirect subsidization of activities Congress chose not to subsidize directly. Respondents claim the district court held that a physically separate facility was not necessary to prevent indirect subsidization. Resp. Br. at 42. But the regulations do not require complete physical separation between LSC and non-LSC programs; they provide only that "the degree of separation" is a factor for LSC to consider when reviewing a grantee's relationship with an affiliate. 45 C.F.R. § 1610.8(a) (1997). Under these circumstances, LSC reasonably determined that "mere book-keeping separation" could allow federal funds to "cross-subsidize" restricted activities.

The second valid purpose of the program integrity regulations is preventing public confusion over whether the government is endorsing the activities of LSC lawyers. Pet. Cert. (99-603) at 77a-80a. Respondents claim this justification is inapplicable to the LSC program because "there is no risk at all that the public will confuse federal government funding of litigation against itself with federal endorsement." Resp. Br. at 42-43. But the federal government will not be the defendant in lawsuits seeking welfare benefits from state and local agencies; in

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*Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969) (restriction on participation in parades); *Niemotko v. State of Maryland*, 340 U.S. 268 (1951) (prosecution for Bible talks); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939) (prohibition on distribution of handbills).

those cases, the federal government will appear to be subsidizing suits against the states. Congress's decision not to subsidize these suits is valid, particularly in light of Congress's virtually simultaneous decision "to increase the flexibility of States" to administer certain welfare laws. 42 U.S.C. § 601(a) (Aug. 1996). Congress legitimately decided that it cannot fairly delegate administration of the welfare laws to the states while simultaneously funding lawsuits alleging that the states are administering those laws improperly.

On this *facial* challenge, Respondents cannot prove that the program integrity regulations do not rationally serve these two legitimate purposes. As the court of appeals concluded, Respondents have not established "that no set of circumstances exists under which the Act would be valid." Pet. Cert. (99-903) at 20a (citing *Rust*, 500 U.S. at 183). Thus, the Court should reject Respondents' suggestion that the regulations are so burdensome and wasteful that no grantee can create an affiliate under them.[14]

The few facts before the Court dispell this contention. At least two grantees have established affiliates in compliance with the program integrity regulations. Resp. Br. at 39. No Respondent alleges that LSC has questioned its certification of program integrity with respect to an affil-

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[14] Contrary to Respondents' suggestion (Resp. Br. at 44-45 n.45), they have brought a facial challenge because they are seeking relief that would invalidate the 1996 Act and/or the program integrity regulations with respect to any LSC lawyer, donor or client, regardless of their circumstances; Respondents are not seeking relief only for themselves, based on how statutes or regulations have been applied to their own individual circumstances. *Walters*, 473 U.S. at 316 and 336-39 (O'Connor, J., concurring) (1985). It is particularly obvious that Respondents' challenge to the program integrity regulations is facial; none of the Respondents is an LSC grantee who alleges that it tried to set up an unsubsidized affiliate, but was unable to do so.

iate. In fact, LSC has notified only one grantee that its attempt to create an affiliate did not meet the regulations. That incident proves nothing, however, because the grantee did not make a good faith effort to comply with the regulations, but instead simply created two separate corporations that shared all personnel, office space, office equipment, and library facilities. CAJA 538-44. There is no reason to conclude that the program integrity regulations are facially unconstitutional.

Finally, Respondents contend that LSC did not have the statutory authority to issue the program integrity regulations, citing a portion of the section-by-section analysis of a 1996 Senate bill. Resp. Br. at 34-35. The language Respondents cite was a comment to a section of similarly worded bill (S. Rep. No. 104-392 at 61-62 (1996)) that *was deleted from the 1996 Act as enacted.* Thus, if anything can be gleaned from the legislative history of the 1996 Act, it is that Congress deliberately decided *not* to prohibit affiliate corporations. As the court of appeals correctly recognized, "LSC enjoys 'the full measure of interpretive authority under the [LSC Act]' to promulgate" the program integrity regulations. Pet. App. (99-603) at 11a. The program integrity regulations should be upheld.

## CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals, insofar as it invalidated the suit-for-benefits limitation, should be reversed.

Dated: New York, New York
August 17, 2000

Respectfully submitted,

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Nos. 99-603 and 99-960

# In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

*v.*

CARMEN VELAZQUEZ, ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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24 pp

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## A. THE WELFARE CLAIM PROVISO IN SECTION 504(a)(16) OF THE 1996 APPROPRIATIONS ACT IS FULLY CONSISTENT WITH THE FIRST AMENDMENT

1. Respondents contend (Br. 12-14, 19-24, 30) that the proviso to Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321-55, restricting the types of representation of welfare claimants that an LSC fund recipient may accept, violates the First Amendment because it allocates subsidies on the basis of viewpoint and suppresses a particular perspective. Respondents rely on cases holding that, when the government creates a public forum, it may not limit access to that forum on a viewpoint discriminatory basis. Resp. Br. 10-14. Respondents fundamentally misconceive the nature of the LSC program.

a. The cases upon which respondents rely did not involve programs at all similar to the LSC program. In *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346 (2000), for instance, the Court considered a program adopted by a state university "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 1354. In that setting, the Court concluded that its public forum cases furnished a "close analogy," and that the viewpoint neutrality standard of those cases therefore should apply. *Id.* at 1354. Similarly, in *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court invalidated a university's effort to exclude all religious speech from a program funding student activities, finding that the program "expends funds to encourage a diversity of views from private speakers," 515 U.S. at 834,

and therefore was subject to scrutiny under the Court's public forum cases, see *id.* at 829-830.[1]

The public forum doctrine is inapplicable here. The LSC program was not designed to facilitate a debate or free exchange of ideas among the recipients of federal funds for the benefit of the larger community, as in *Southworth* and *Rosenberger*. Indeed, LSC funds are not furnished to facilitate the public expression of the recipients' own views at all. Rather, the LSC was established to enable fund recipients to provide a particular professional service—legal representation—to particular individuals, namely, to indigent persons in certain types of legal proceedings before an agency or in court. See *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1028 (9th Cir.) (White, J.) ("Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas."), cert. denied, 525 U.S. 1015 (1998). Although lawyers, in furnishing those services, present legal and factual arguments on behalf of their clients, those focused submissions are made under structured rules and are presented for their independent legal significance in governmental decision-making processes, not as an act of self-expression (by either lawyer or client) of the sort that the Court's free speech cases have addressed.

Issues concerning the attorney-client relationship, the role of counsel in litigation, access to courts, suing the government, and the availability of government-funded counsel have typically been dealt with by reference to rules of ethics, court rules, statutes, and doctrines such as sovereign immunity. To the extent the Constitution speaks to those issues,

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[1] *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 675-676 (1998), also cited by respondents (Br. 11, 13-14), involved the standards applicable to a candidate's access to a political debate on a public television station—a setting far removed from the furnishing of legal services to an individual client.

it is primarily through the Due Process Clause, not the First Amendment. See, *e.g.*, *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (in a case involving the individual interest in presenting a benefits claim, "appellees' First Amendment arguments, at base, are really inseparable from their due process claims"); *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18 (1981) (Due Process Clause does not require government-funded counsel in parental-status termination proceeding); *Ortwein* v. *Schwab*, 410 U.S. 656, 658-660 & n.5 (1973) (Due Process Clause does not prohibit filing fee for judicial review of welfare benefits denial; First Amendment furnishes no independent basis for claim); *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970) (Due Process Clause does not require government-funded counsel in welfare hearing). Accordingly, although an attorney's ability to accept particular cases is often restricted by a wide array of laws and rules, such measures generally are not viewed as raising First Amendment issues.[2] If they were, rules governing attorney ethics and conflicts of interests, and state and federal restrictions like Federal Rule of Civil Procedure 11, which prohibit attorneys from filing complaints unless they are certified by the attorney as meeting certain standards, would be subject to heightened scrutiny. But such laws and rules are instead treated as reasonable limitations on an attorney's ability to provide legal representation in certain circumstances. Section 504(a)(16) should be viewed in a similar manner and as not triggering distinct First Amendment scrutiny. As this Court observed in *Walters*,

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[2] In cases such as *Brotherhood of R.R. Trainmen* v. *Virginia*, 377 U.S. 1 (1964), relied upon by respondents (Br. 15-16), "the First Amendment interest at stake was primarily the right to associate collectively for the common good," not, as here, "the individual interest in best prosecuting a claim," *Walters*, 473 U.S. at 335. And *NAACP* v. *Button*, 371 U.S. 415 (1963), and its progeny, also relied upon by respondents (see Br. 14-15), involved the First Amendment rights of an organization to use litigation to promote its own political goals. Congress surely was not required to fund any political goals LSC fund recipients may have in their own right.

473 U.S. at 335 & n.13, "the constitutional analysis of a regulation that restricts core political speech * * * will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings."

A different analysis is not required on the ground that the Section 504(a)(16) proviso affords a greater likelihood of free legal representation to a certain type of litigant (a welfare claimant seeking benefits under the existing welfare system, who can hope to be one of those represented by an LSC fund recipient lawyer) than to another type of litigant (a welfare claimant seeking relief that involves a challenge to existing welfare reform law, who must find free representation elsewhere). Congress often acts in a way that favors one type of litigant over another, sometimes based on the nature of the litigant's legal claim. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) ("citizen-suit provision * * * favor[s] environmentalists in that it covers all private violations of the [Endangered Species Act] but not all failures of the Secretary to meet his administrative responsibilities"); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978) (award of attorney's fees under Title VII to prevailing plaintiff is governed by more favorable standard than standard governing award of attorney's fees to prevailing defendant); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983) (same differential standards govern attorney's fees awards under 42 U.S.C. 1988); cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) (statute allows handlers of dairy products to seek judicial review of administrative order but does not allow ultimate consumer to seek judicial review of same order). And far from calling for the strictest of scrutiny, as respondents assert (Br. 12), special rules in suits against the government are common, as demonstrated most prominently by the doctrine of sovereign immunity, which can limit the type of relief that can be obtained against the government or bar such suits altogether.

b. Respondents take issue (Br. 22-27) with our position that the Section 504(a)(16) proviso represents a legitimate instance of Congress defining the scope of a funding program by subsidizing some services but not others. They assert (*id.* at 22) that our position reduces the First Amendment analysis to an "exercise in semantics," because "virtually every viewpoint discriminatory allocation of a speech subsidy can be repackaged semantically as a decision to fund one 'program' or 'service' rather than another." Respondents' objection overlooks the express holding of *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that Congress does not engage in viewpoint discrimination by "refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-195. That is precisely what Congress has done here.

Respondents err in contending (Br. 18-21, 27) that the holding in *Rust* applies only where the government itself is the speaker. The analysis in *Rust* did not rely on that proposition. The Court held that the government does not violate the Constitution when it "selectively fund[s] a program to *encourage certain activities* it believes to be in the public interest, without at the same time funding an alternative program that seeks to deal with the problem in another way." 500 U.S. at 193 (emphasis added). Indeed, respondents concede (*id.* at 19 n.17) that "the true speaker in *Rust* was not the government." Nor, contrary to respondents' assertion (*id.* at 12-14, 18 n.16), have this Court's subsequent cases limited *Rust* in the manner respondents propose or otherwise suggested that the standards governing a public forum apply to all government-funded speech except when the government itself is the speaker.[3]

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[3] In *Rosenberger*, the Court did not describe *Rust* as a case in which the government itself was actually speaking; it said that the government "used private speakers to transmit specific information pertaining to its own program," 515 U.S. at 833—a program making federal funds available for professional family planning counseling that was conducted by the

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." That freedom is presumptively "abridged" when the government directly regulates private speech, or limits access on the basis of content or viewpoint to a forum it has established for free private expression. But government subsidies, like private donations, *expand* the opportunity for private expression. Thus, even in the context of ordinary free expression, they

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recipients of the funds, not the government. Significantly, moreover, after noting that in situations involving a governmental message, the government may take appropriate steps to ensure that the message is not garbled or distorted by the grantee, *ibid.*, the Court stated that "[i]t does not follow * * * that viewpoint-based restrictions are proper when the University does not itself speak *or subsidize transmittal of a message it favors* but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834 (emphasis added). The emphasized passage makes it clear that *Rosenberger* did not hold that the government is foreclosed from subsidizing private expression that it favors, where it has refrained from establishing what is, in essence, a public forum for the free expression of a broad range of private views. Accord 515 U.S. at 829-830.

Similarly, in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), the Court reiterated what it said *Rust* "held": that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest," and that, in doing so, "the Government has not discriminated on the basis of viewpoint," *id.* at 588 (quoting 500 U.S. at 193); and the Court in *Finley* distinguished *Rosenberger* as a case in which the Government "indiscriminately 'encourage[d] a diversity of views from private speakers,'" *id.* at 586 (quoting 515 U.S. at 834). (Respondents' quotation from *Finley* (see Resp. Br. 18 n.16) is from the dissenting opinion in that case.)

In *Southworth*, although the Court cited *Rust* following its statement that public forum analysis would not apply where the university speaks, 120 S. Ct. at 1357, the Court did not thereby imply that the central principle of *Rust*—that in a broad range of situations the government may selectively fund a program to encourage certain activities—had been abandoned and replaced with a rule that the government may favor a particular message *only* when the government itself does the speaking. Indeed, in addition to citing *Rust* in connection with its statement concerning speech by the university itself, the Court also cited *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), a case that indisputably involved expressive activity (lobbying) by private entities, not the government. Accord 120 S. Ct. at 1354.

do not, absent more, "abridge" the freedom of speech of those persons who are not subsidized. See *Lyng* v. *Automobile Workers*, 485 U.S. 360, 368 (1988) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right") (quoting *Regan* v. *Taxation With Representation*, 461 U.S. 540, 549 (1983)); see also *Regan*, 461 U.S. at 546. *A fortiori* that is so in the specialized setting of government funding of representation in litigation.

c. Even if the Court were to apply notions of viewpoint neutrality in the present setting, respondents could not prevail. Their argument that the Section 504(a)(16) proviso discriminates against a particular viewpoint in the allocation of federal funding is based on a misunderstanding of the proviso. Respondents characterize it as protecting an undefined, monolithic "government viewpoint." But the proviso does not operate in that manner.

The proviso prohibits legal representation of an individual welfare claimant by an LSC fund recipient where the relief sought challenges "existing law." § 504(a)(16), 110 Stat. 1321-55; 45 C.F.R. 1639.4 (U.S. Br. App. 29a). LSC has defined "existing law" to mean "Federal, State or local statutory laws or ordinances which are enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto that have been formally promulgated pursuant to public notice and comment procedures." 45 C.F.R. 1639.2(b) (U.S. Br. App. 28a-29a).[4]

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[4] LSC regulations define "an effort to reform a Federal or State welfare system" to include the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (except for its child support enforcement provisions) and "subsequent legislation enacted by Congress or the States to implement, replace or modify key components" of PRWORA, or "by States to replace or modify key components of their General Assistance or similar means-tested programs conducted by States or by counties with State funding or under State mandates." 45 C.F.R. 1639.2(a) (U.S. Br. App. 28a). In adopting that definition, LSC explained that Congress was considering Section 504(a)(16) while it was also considering PRWORA. See 62 Fed. Reg. 30,764-30,765 (1997). Thus, LSC's interpre-

Thus, the Section 504(a)(16) proviso precludes a welfare claimant from being represented by an LSC fund recipient where the claimant seeks relief that challenges any state or federal welfare reform law. That prohibition applies regardless of the "viewpoint" of the challenged law or the person challenging it—*e.g.*, whether the law being challenged was enacted to reform a welfare system to the advantage of welfare claimants or to their disadvantage. Respondents nonetheless charge that the proviso "is openly premised on hostility toward legal arguments challenging a particular government viewpoint." Resp. Br. 30. That is not true—even if we accept for present purposes the strained hypothesis that the text of a duly enacted law is properly characterized as a "viewpoint" in this context. For example, the proviso prohibits representation by an LSC fund recipient not only in a case where a welfare claimant seeks relief challenging a federal welfare reform statute, but also in a case where a welfare claimant relies on the same federal welfare reform statute and seeks relief challenging a state welfare reform law or regulation as inconsistent with the federal statute. Also, the proviso precludes representation by an LSC fund recipient where the relief sought challenges the welfare reform law "in effect on the date of the initiation of the representation," § 504(a)(16), 110 Stat. 1321-55, even though that law may include provisions that are directly contrary to those in another welfare reform law in effect on the date representation was initiated in another case.

In sum, the Section 504(a)(16) proviso is properly regarded not as resting on a hostility to a particular "viewpoint," but rather as furthering Congress's legitimate purpose of ensuring that federal funds and federally subsidized attorneys are not directed to efforts to upset the reforms of

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tation furthers Congress's intent in enacting PRWORA "to increase the flexibility of States" in operating welfare systems, 42 U.S.C. 601(a) (Supp. IV 1998); see *Saenz* v. *Roe*, 526 U.S. 489 (1999), by precluding federal subsidization of lawsuits challenging such welfare reform systems.

welfare laws that have recently been put in place by Congress and the States. See note 4, *supra*. That purpose is justified by Congress's determination that there is a need to focus the limited resources of LSC fund recipients on providing representation in run-of-the-mine individual claims for benefits under those laws, because such cases are specifically calculated to obtain benefits for persons who are entitled to receive them, are less time-consuming and less expensive than challenges to the welfare programs themselves, and are less likely to attract other lawyers. See U.S. Br. 25-27. Moreover, a limitation on federal subsidies of counsel, like a decision not to enact a fee-shifting statute or a decision to invoke sovereign immunity, necessarily reflects a judgment regarding the need for an apportionment of incentives in a particular context, and may also take into account considerations of respect and comity between the federal and state governments, as reflected here in the devolution of authority to the States under PRWORA. Cf. *Alden* v. *Maine*, 527 U.S. 706, 754 (1999).

2. Respondents also contend (Br. 14-17, 27) that the Section 504(a)(16) proviso violates the First Amendment rights of attorneys employed by LSC fund recipients because it impermissibly intrudes on their associational relationship with their clients. Respondents acknowledge that Congress is not generally obligated to furnish welfare claimants with a free lawyer (*id.* at 16), but they contend that, "once Congress elects to fund a lawyer-client relationship," the government cannot "manipulate the expressive associational activities of the participants" (*id.* at 16-17).

a. The fundamental flaw in that line of argument is that Congress has elected *not* to fund a lawyer-client relationship between an attorney employed by an LSC fund recipient and a welfare claimant who seeks relief that would invalidate existing welfare reform laws and regulations. Section 504(a)(16) does not bar an attorney employed by an LSC fund recipient from expressing to a person seeking legal

assistance (or to anyone else) his or her views regarding any legal issue, including that a welfare reform law or regulation is unlawful or unconstitutional. But the LSC Act and appropriations provisions do not allow that attorney to agree to provide legal representation, under the auspices of an LSC fund recipient, to all potential clients or to pursue all potential claims. Lawyers employed by an LSC fund recipient accordingly are obliged to describe to a potential client at the outset the statutory limitations on LSC-funded representation, including the Section 504(a)(16) proviso, and to decline to provide legal representation in cases covered by that (or other) restrictions. The attorney is free, however, to refer a potential client to another attorney who is not subject to the LSC restriction.[5]

The fact that the proviso precludes an attorney employed by an LSC fund recipient from forming, within the confines of an LSC-funded program, an attorney-client relationship with a potential client for purposes of a particular lawsuit does not violate the First Amendment. That limitation is a condition of the attorney's employment by a recipient of

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[5] Respondents complain (Br. 24-26) that it is "often" impossible for an LSC fund recipient lawyer to know at "the outset of an attorney-client relationship" whether representation of a welfare claimant will involve a challenge to existing law. Respondents offer no empirical support for that assertion, and ethical considerations may well require an attorney to resolve any such doubts at the outset against undertaking the representation. See ABA Comm. on Ethics & Prof. Resp., Formal Op. 96-399 (1996). But even if respondents' speculation proved to be accurate, that would not render Section 504(a)(16) unconstitutional. It would simply mean that a lawyer who had accepted representation would have to withdraw if he continued to be supported by LSC funds. While the rules of ethics would then speak to the manner in which the withdrawal would be accomplished, those ethical considerations do not present matters of constitutional dimension. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 633 n.10 (1989). Moreover, speculation about particular cases is insufficient to sustain a facial constitutional challenge—a "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Finley*, 524 at 569; see also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000).

federal funds and is a condition to which the attorney freely agrees when he or she accepts that employment. Thus, respondents' claim of unrestricted associational rights and their reliance (Resp. Br. 14-16, 27-28) on cases such as *NAACP* v. *Button*, 371 U.S. 415 (1963), are misplaced. In none of those cases did the attorneys or the organization claim the right to federal funding to subsidize their First Amendment activities. See also note 2, *supra*. Moreover, as respondents concede (Br. 39), an attorney employed by an LSC fund recipient is not prohibited from exercising whatever right he or she has to associate with clients outside of the LSC program.

b. There is no merit to respondents' argument (Br. 16-17) that *Rust* supports their attorney-client associational claim. Although the Court observed in *Rust* that one could argue, by analogy to the university setting, that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," 500 U.S. at 200, the Court declared that it "need not resolve that question" because the challenged regulations did not "significantly impinge upon the doctor-patient relationship." *Ibid.*

Both of the reasons the Court gave for that conclusion in *Rust* apply with equal force here. First, the Court noted that "[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. That is unquestionably the case with respect to a lawyer employed by a recipient of LSC funds. Second, the Court observed that the doctor-patient relationship established by the federally funded program was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Ibid.* The same is true under the LSC program. That program allows the establishment of an attorney-client relationship to pursue a client's rights with regard to certain categories of legal

issues. See, *e.g.*, 42 U.S.C. 2996e; 42 U.S.C. 2996f(b) (1994 & Supp. IV 1998). Those relationships are not so all-encompassing, however, as to justify an expectation on the part of a client that he or she is entitled to comprehensive legal representation for all possible welfare claims. More importantly, LSC fund recipients remain free to inform clients of the limitations on the legal representation that they can provide, and, unlike in *Rust*, they may refer individuals who need other types of representation to other attorneys or offices, including any affiliate organization.

### B. RESPONDENTS' CHALLENGES TO THE REGULATIONS ALLOWING FUND RECIPIENTS TO ESTABLISH SEPARATE ENTITIES TO ENGAGE IN RESTRICTED ACTIVITIES USING NON-FEDERAL FUNDS DO NOT WARRANT REVIEW AND ARE WITHOUT MERIT

Respondents argue, in the alternative, that, even if the statutory limitation on the use of federal funds is constitutional, the restriction on the use by an LSC fund recipient of non-federal funds to provide representation in challenges to existing welfare reform laws places an unconstitutional condition on its receipt of federal funds because Congress did not leave open adequate alternative channels for LSC fund recipients to exercise their own First Amendment rights. Yet at the same time, respondents challenge, as beyond LSC's authority, the LSC regulations that *allow* an LSC fund recipient to provide for the furnishing of restricted services through the use of non-LSC funds by establishing a separate organization for that purpose.

As we point out in our opening brief (at 23 n.11), respondents have sought review of the Second Circuit's rejection of those contentions in their certiorari petition in No. 99-604, *Velazquez* v. *Legal Services Corp.*. The Court has not granted that petition, however, and the court of appeals' decision in that regard does not merit review by this Court be-

cause it is in accord with the decision of the Ninth Circuit in *Legal Aid Soc'y of Haw.*, 145 F.3d at 1024-1029, does not conflict with the ruling of any other circuit, and is supported by this Court's decisions in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), *Regan*, and *Rust*, which held that such separate-entity requirements are consistent with the First Amendment. Respondents nevertheless seek to have the Court consider their contentions here by asserting (Br. 33 n.32) that they furnish an alternative ground for affirmance of that portion of the Second Circuit's judgment that held Section 504(a)(16) unconstitutional. The logic of respondents' contentions, however, would invalidate all of the restrictions in Section 504(a), not simply the welfare benefits proviso to Section 504(a)(16), and, moreover, the Second Circuit's reasoning with respect to Section 504(a)(16) appears to apply to both LSC and non-LSC funds.[6] But whether or not these factors would preclude the Court from considering respondents' arguments as alternative grounds for affirmance of the Second Circuit's judgment concerning Section 504(a)(16) (see R. Stern et al., *Supreme Court Procedure* § 6.35, at 365-367 (7th ed. 1993)), the Court should decline to do so as a matter of discretion since, as we have said, they do not warrant review. See *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).

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[6] The district court ruled on respondents' motion for a preliminary injunction, which sought to prevent LSC "from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using *non-federal* funds to * * * challenge the constitutionality of welfare statutes, to challenge the legality of welfare regulations or statutes." J.A. 48 (emphasis added). The court of appeals' decision was rendered on interlocutory appeal of that order under 28 U.S.C. 1292(a)(1), and it might therefore be argued that the court of appeals' judgment is confined in that sense to the application of the funding restrictions to non-federal funds. As respondents recognize (Br. 5), however, the court of appeals' reasoning would invalidate the proviso to Section 504(a)(16) as applied to federal and non-federal funds alike.

If the Court does reach those arguments, they are without merit. Respondents argue, first, that contrary to LSC's regulations, the statute *prohibits* the furnishing of restricted services through a separate affiliate, and therefore imposes an unconstitutional condition on the receipt of federal funds by prohibiting a recipient altogether from engaging in such services, even with nonfederal funds. Second, respondents argue that, even if LSC's regulations are based on a valid construction of the statute, the requirement of complete institutional separation imposes an impermissible burden on the use of nonfederal funds. Both arguments are mistaken.

1. The court of appeals correctly held that the LSC regulations, which were issued after notice-and-comment rulemaking, rest on a reasonable interpretation of the relevant statutes and are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). See 99-960 Pet. App. 12a-14a, 17a-23a. LSC is vested with the duty to administer the statutory scheme and to fill any gaps left by Congress through such regulations. See 42 U.S.C. 2996e(a)(1)(A) and (B), 2996g; *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 689 (D.C. Cir. 1991). Accordingly, the "basic principles of *Chevron* apply to the statutory scheme" created by the LSC Act "and the role contemplated for LSC under it." *Ibid.* It follows that LSC's interpretation of Section 504(a)(16) must be upheld unless Congress has directly spoken to the question and resolved it differently, or the regulations are based on an impermissible construction of the statute. *Chevron*, 467 U.S. at 842-844.

Contrary to respondents' contention (Br. 34-37), there is nothing in the text of the 1996 Appropriations Act that precludes an LSC fund recipient from engaging in otherwise restricted activities through an affiliated organization. Section 504(a) of the 1996 Act provides that "[n]one of the funds appropriated" in that Act to LSC "may be used to provide financial assistance to any person or entity" that is described in subsections (1) through (19), 110 Stat. 1321-53; U.S. Br.

App. 1a-2a. Section 504(d)(2)(B) further provides that funds received by a recipient from a source other than LSC "may not be expended by recipients for any purpose prohibited by" the 1996 Act or the LSC Act. 110 Stat. 1321-56; U.S. Br. App. 10a. An LSC fund recipient does not act inconsistently with either of those provisions if it creates an affiliate organization to spend non-federal funds and abides by the program-integrity requirements of the LSC regulations. The affiliate does not "use[]" federal funds to engage in activities prohibited by Section 504(a)(16), and the LSC fund recipient does not "expend[]" any funds it receives for any of those purposes. Moreover, respondents' argument was properly rejected by the court of appeals in light of "the rule favoring an interpretation of a statute that preserves its constitutionality." 99-960 Pet. App. 14a. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Respondents quote a passage in a Senate Report stating that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." Resp. Br. 35 (quoting S. Rep. No. 392, 104th Cong., 2d Sess. 13 (1996)). The bill that was the subject of that Report would have amended Section 1013 of the LSC Act expressly to provide that "[a]ny attempt, such as the creation or use of 'alternative corporations,' to avoid or otherwise evade the provisions of this title or the Legal Services Reform Act of 1995 is prohibited." See S. Rep. No. 392, *supra*, at 40. The fact that Congress did not include that provision in the 1996 Act and subsequent appropriations acts (see U.S. Br. 2; U.S. Br. App. 1a-25a) supports LSC's interpretation of Section 504(a) not to preclude establishment of an affiliate organization as provided in the LSC regulations.

2. LSC's regulations do not place unconstitutionally burdensome restrictions on a recipient's use of non-federal funds to exercise First Amendment rights. See Resp. Br. 38-44. Congress has broad power to specify the purposes for which

funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl. 7. It is well settled that Congress, in exercising that power, may, "in order to ensure the integrity of the federally funded program," *Rust*, 500 U.S. at 198, provide that federal funds are not to be used to facilitate particular activities that also are supported by non-federal funds—even if the activities involved are of a sort that are fully protected by the First Amendment when engaged in without federal support so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in those activities. See, *e.g.*, *League of Women Voters*, 468 U.S. at 400. Congress may require that such an affiliate organization be kept "physically and financially separate" from the organization that receives federal funds. *Rust*, 500 U.S. at 180, 187-190.

As we explain at greater length in our brief in opposition (at 12-18) in No. 99-604, this Court has, on several occasions, rejected contrary arguments akin to those pressed by respondents. *See Regan*, 461 U.S. at 544-545; *League of Women Voters*, 468 U.S. at 400; *Rust*, 500 U.S. at 180-181, 198. The LSC restrictions, as implemented by LSC in its final regulations, are fully consistent with the Court's explanation in those cases of the separation requirements the Constitution permits the government to impose in order to eliminate the risk of direct or indirect subsidization of activities that Congress has chosen not to fund. LSC fund recipients are allowed to create affiliates that use non-LSC funds to provide legal services that are foreclosed to the LSC fund recipients themselves. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See 99-960 Pet. App. 10a, 76a.[7] As

[7] Like the *Rust* regulations, the LSC regulations require "physical and financial separation" as part of a requirement that the LSC fund recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and

in *Rust*, "Congress has merely refused to fund [certain] activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the [federally funded] project in order to ensure the integrity of the federally funded program." 500 U.S. at 198.

Moreover, the LSC restrictions are more permissive in some respects than those at issue in *Rust*, because the latter contained a rule that prevented physicians from discussing abortion as a method of family planning or referring a patient to an abortion provider. See 500 U.S. at 180. The LSC regulations contain no comparable restrictions As a result, LSC fund recipients may discuss with their clients what other options they might have (including activities in which the LSC fund recipient may not engage) and may refer clients to organizations that provide restricted services (including any affiliate organization the LSC fund recipient may create under the program-integrity regulations).[8]

3. Respondents attempt to distinguish *Rust* by contending (Br. 41-43) that there is no justification for requiring that an affiliate of an LSC fund recipient be physically separate because longstanding LSC bookkeeping requirements are sufficient to prevent government subsidization of restricted activities in which the affiliate engages.

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financial separation under the LSC program is determined on a case-by-case basis using the same factors identified in the *Rust* regulations: the existence of "separate personnel," "separate accounting and timekeeping records," "the degree of separation from facilities in which restricted activities occur," and the presence of "forms of identification which distinguish the recipient" from the affiliate. Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9.

[8] The one requirement in the LSC regulations that was not in the *Rust* regulations—that an LSC fund recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8(a)(1))—does not alter the analysis, because such a requirement was held by this Court in *Regan* not to constitute an undue burden. 461 U.S. at 544-545 n.6; see *Legal Aid Soc'y of Haw.*, 145 F.3d at 1027-1028.

Respondents are wrong that bookkeeping necessarily ensures that federal funds do not subsidize restricted activities. Respondents' argument (Br. 38) that establishing a physically separate affiliate imposes wasteful and inefficient burdens on recipients (by requiring duplication of resources) confirms that, absent physical separation, the funds of the LSC fund recipients are, to the extent of the burden respondents assert, subsidizing the affiliate's activities by making them more efficient and less costly. It is precisely that sort of indirect subsidy that Congress intended to prohibit and that the LSC regulations are designed to prevent.[9] Put another way, respondents are complaining of the very costs and asserted "burdens" that legal services organizations would have to bear if they received no federal funds at all. The federal restrictions therefore are not properly regarded as the cause of those costs and burdens.[10]

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[9] Congress made clear when it enacted the statutory restrictions that "it is inappropriate for Federal resources to be used to support directly or indirectly these [prohibited] activities," since these activities "only further drain much needed resources from the program's core mission—to provide basic legal aid to poor individuals." H.R. Rep. No. 196, 104th Cong., 2d Sess. 121 (1996); see also S. Rep. No. 392, *supra*, at 7 ("many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds").

[10] We do not doubt that it would be easier for LSC grant recipients to benefit from the economies of scale allowed by shared resources. Yet as respondents themselves acknowledge (Br. 39-40), some recipients have established physically separate affiliates, and therefore the notion that it is impossible to do so is simply incorrect. See also C. Carr & A. Hirschel, *The Transformation of Community Legal Services, Inc., of Philadelphia: One Program's Experience Since the Federal Restrictions*, 17 Yale L. & Pol'y Rev. 319 (1998). If a recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions only if the donor makes a specific choice to give the money to the recipient rather than its non-LSC affiliate, after receiving written notification that that choice would make the contribution subject to the same restrictions as federal funds. That consequence raises no substantial First Amendment issue.

This Court has recognized that the government has a strong interest in maintaining the integrity of the programs it funds and in preventing direct or indirect subsidies to activities that Congress has chosen not to fund. In *Rust*, for instance, the Court held that the regulations requiring physical separation furthered the interest in preventing federal funds from being spent on prohibited activities, see 500 U.S. at 198, and rejected the argument that the program could not extend to private matching funds. *Id.* at 199 n.5. And in *Regan*, the Court noted: "TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." 461 U.S. at 544.

Respondents suggest that the only other possible objective of the separation requirement is in avoiding the perception that the government endorses the restricted activities, which, they assert, is an insubstantial or even impermissible interest. See Resp. Br. 42-43. This case, however, is unlike *Rosenberger*, in which the fact that the university funded a multiplicity of competing student views reduced the potential that it endorsed any one of them. 515 U.S. at 841-842. Here, Congress could be legitimately concerned that the public would perceive that federal funds were being used to support, and thus endorse, the restricted activities.[11] Cf.

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[11] As one Member of Congress stated, in the eyes of the public, "every time they [legal services lawyers] go out they are wearing the imprimatur of Congress and they are the Federal Government, and the public does not distinguish the difference." 138 Cong. Rec. 10,521 (1992) (statement of Rep. McCollum). In conjunction with a subsequent proposal to limit the activity of LSC grantees, concern was expressed in Congress that "the public cannot differentiate between LSC advocacy subsidized with public versus private funds." S. Rep. No. 392, *supra*, at 7. As a result, Congress enacted the LSC restrictions to "maintain the credibility and effectiveness of the program," 141 Cong. Rec. 27,002 (1995) (statement of Sen. Hollings), and to "protect LSC from the negative perceptions of those who wish to

*Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985) ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). LSC's regulations also advance an additional government interest: avoiding the public perception that federal funds are being used in a manner not authorized by Congress. That interest is crucial to the integrity of the LSC program and is precisely the governmental interest that the Court recognized in *Rust*. See 500 U.S. at 188.[12]

* * * * *

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed insofar as it holds unconstitutional the proviso in Section 504(a)(16).

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

AUGUST 2000

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see its termination." 142 Cong. Rec. 4715 (1996) (remarks of Sen. Domenici).

[12] Respondents' contention (Br. 45-47) that the Section 504(a)(16) proviso violates separation of powers by interfering with the decisional autonomy of the judiciary is without merit. Nothing in Section 504(a) prevents a court from declaring what the law is, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), or directs a decision in a particular case, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). Nor does Section 504(a) authorize LSC attorneys to represent certain clients and then preclude them from calling certain legal issues to the court's attention. Rather, the proviso prohibits LSC attorneys from representing a client at all in a case in which the client seeks relief that challenges existing welfare reform laws. The proviso does not preclude any welfare claimant, whether proceeding pro se or represented by someone other than an LSC fund recipient, from seeking such relief or making any legal argument in support thereof.

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Nos. 99-603 & 99-960

In the
# Supreme Court of the United States

LEGAL SERVICES CORPORATION,
*Petitioner,*
v.
CARMEN VELAZQUEZ,
*Respondent.*

UNITED STATES,
*Petitioner,*
v.
CARMEN VELAZQUEZ,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF LEGAL SERVICES CORPORATION

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## INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Legal Services Corporation and United States of America.[1] All parties consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has adopted a legal policy objective that, in our representative democracy, government agencies should be required to operate within strictly defined constitutional and statutory limits. To that end, PLF is submitting this brief to provide an additional viewpoint with respect to the issues presented. PLF is particularly concerned that attorney and judicial activists be restrained from expanding federal welfare spending not merely beyond its intended purposes, but in direct contravention of its specified purposes.

## OPINION BELOW

The opinion below is reported as *Velazquez v. Legal Services Corporation*, 164 F.3d 757 (2d Cir. 1999).

## STATEMENT OF THE CASE

The Legal Services Corporation (LSC) is a nonprofit corporation created by the Legal Services Corporation Act of 1974 (LSCA), 42 U.S.C. § 2996, *et seq.*, "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

legal assistance." *Id.* § 2996b(a). LSC makes and administers grants of funds, appropriated by Congress, to local organizations that in turn provide free legal assistance to indigent clients. Many LSC grantees receive funding through other public or private sources as well as the federal LSC funds. *Velazquez*, 164 F.3d at 759.

From its beginnings, the LSC program has restricted LSC grantees in the use of LSC funds. Grantees have been prohibited from using LSC funds, for example, in criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation or military desertion. *Id.* at 759-60. The restrictions on LSC grantees were expanded by the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) Pub. L. No. 104-34, § 504, reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. No. 104-208, § 502. OCRAA § 504 prohibits using LSC funds to aid entities that engage in various activities including lobbying, class actions, assisting aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees, prisoner litigation, and pursuing welfare reform. *Velazquez*, 164 F.3d at 759-60.

Specifically, the welfare reform provision states: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . ."

> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such

> relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation . . . .

OCRAA, § 504(a)(16); *Velazquez*, 164 F.3d at 760.

This prohibition extends not only to LSC funds, but to funds from any source. OCRAA provides that although LSC recipients may "use funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be expended by recipients for any purpose prohibited by this Act." *Id.* § 504(d)(2)(b); *Velazquez*, 164 F.3d at 760.

Plaintiffs filed suit in January, 1997, charging that the restrictions on the use of nonfederal funds violated their rights under the First, Fifth, and Tenth Amendments to the United States Constitution. Plaintiffs sought a preliminary injunction to bar restrictions on the use of nonfederal funds. *Velazquez*, 164 F.3d at 761. The district court denied the injunction and, on appeal, the United States Second Circuit Court of Appeals reversed as to the welfare benefits portion of OCRAA. The Second Circuit, with Judge Jacobs dissenting, found that Section 504(a)(16) "unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." 164 F.3d at 772. This Court granted certiorari.

## SUMMARY OF ARGUMENT

In providing funding to LSC grantees, Congress has chosen to fund selectively certain legal services to the express exclusion of others, including challenges to welfare reform statutes. Under this Court's precedents, this is not unconstitutional "viewpoint discrimination," but merely an appropriate legislative determination that the legal needs of the indigent are best served by attention to securing their rights under existing law, rather than expensive and time-consuming challenges to the law.

In striking down the welfare reform litigation exclusion, the Second Circuit ignored its own holdings and the holdings of this Court that permit Congress to exclude funding for particular purposes so long as alternative procedures are available. The Second Circuit failed to consider that welfare reform laws are subject to challenge by non-LSC funded sources such as public interest law firms and pro bono lawyers.

## ARGUMENT

### I

### FUNDING OF LSC GRANTEES TO REPRESENT WELFARE CLIENTS DOES NOT CREATE A PUBLIC FORUM

This Court held in *Rust v. Sullivan,* 500 U.S. 173, 191 (1991), "a decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform.'" The Second Circuit in its ruling gave very little thought to this basic principle of separation of powers.

In striking down the limitation on challenges to welfare reform laws, the Second Circuit read Section 504(a)(16) to mean

> representation of a client seeking a welfare benefit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

*Velazquez,* 164 F.3d at 769.

In finding that the welfare reform limitation violated the First Amendment, the Second Circuit gave a cursory examination to controlling law. Thus, the court acknowledged that *Rust v. Sullivan*, 500 U.S. 173, upheld regulations forbidding recipients of government funds for family planning from counseling or advocacy related to abortion and that *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), upheld a requirement that the National Endowment for the Arts (NEA), in making grants for the arts based on excellence, take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at 572. *Velazquez*, 164 F.3d at 770. In attempting to distinguish *Rust* and *Finley*, the Second Circuit stated its view that the ability of a lawyer to argue that a statute, rule or governmental practice barring a client's claim is unconstitutional "falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art." *Velazquez*, 164 F.3d at 771.

The court found this limitation was not "viewpoint neutral" because it permits funding to those who represent clients without challenging existing laws, but denies funding to those whose representation challenges existing rules. *Id.* at 769-70. As the court put it:

> It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint . . . .

*Id.* at 770.

**A. The *Rosenberger* Rule Does Not Apply to the Provision of Legal Services**

The court ruled that government discrimination against speech because of its message is suspect under the First Amendment, *id.* citing *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). In *Rosenberger*, this Court struck down on First Amendment

grounds a provision of a governmental grant program to support student publications that excluded from eligibility publications that expressed a viewpoint on religion. *Id.* at 837.

However, as stated in *Legal Aid Society of Hawaii v. Legal Services Corporation,* 145 F.3d 1017, 1028 (9th Cir. 1998), (*LASH*), the "analogy to *Rosenberger* is not persuasive." Justice White, speaking for the unanimous Ninth Circuit panel, held:

> The government in *Rosenberger* "expended funds to encourage a diversity of views from private speakers, *id.* at 834, unlike the LSC program where "the government [has] appropriated public funds to promote a particular policy of its own," *id.* at 833. Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.

*Id.* at 1028.

The inapplicability of *Rosenberger* was further explained in *National Endowment for the Arts v. Finley*, 524 U.S. 569. There, this Court rejected a First Amendment challenge to a statutory directive for the NEA to ensure that

> artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1). This Court noted:

> In *Rosenberger*, a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited

> public forum, from which it impermissibly excluded all publications with religious editorial viewpoints.

*Rosenberger*, 515 U.S. at 837.

Here, by contrast, in subsidizing legal assistance for indigents, Congress was not creating a public forum, limited or otherwise. The mandate of LSC is to provide legal representation to the poor for certain purposes, to the exclusion of certain specified areas of representation, whether it be criminal proceedings or challenges to welfare reform.

### B. The Role of LSC Attorneys Is to Represent Clients' Rights Under Existing Law, Not to Create a Public Forum for Discussion of National Issues

The court below sets up a straw argument that Congress could not lawfully fund institutions set up to study the Nation's foreign or domestic policies, conditioned on the grantees not criticizing, or advocating change in, the policies of the government. *Velazquez*, 164 F.3d at 771. The fallacy of the court's analogy is that LSC grantees are not being paid to study welfare reform in order to report to the Nation on it. They are being paid, if they choose to involve themselves, to represent their clients' rights under welfare reform statutes or rules as they are written. They are not being paid to present a diversity of views on the topic of welfare reform.

Justice White put the matter into sharp focus in *LASH*, 145 F.3d at 1028:

> Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.

To similar effect, this Court declared in *Finley:*

> In the context of arts funding, in contrast to many other subsidies, the Government does not

> indiscriminately "encourage a diversity of views from private speakers," *id.* at 834. The NEA's mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were "'related to the educational purpose of the University,'" *id.* at 824 —and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to "'all newspapers and other periodical publication.'"

*Id.* at 586 (citations omitted).

In imposing the welfare reform limitation, Congress obviously intended that LSC grantees not divert their attention from the individual legal needs of their clients in order to conduct a public forum or crusade, however, emotionally rewarding that may be for the LSC attorneys. What Congress intends is that someone do the drudge work of representing indigent clients' individual interests under the laws as they presently exist. If LSC attorneys cannot restrict themselves to these duties they are free to seek other employment with private or public interest law firms that have no such restrictions.

This Court summarized the issue in *Finley*:

> Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.

> *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). In the 1990 Amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "public funds . . . must ultimately serve public purposes the Congress defines." § 951(5).

*Id.* at 587-88.

Here, Congress has defined the public purpose of LSC to exclude funding of legal challenges to welfare reform. And to make the matter absolutely clear, *Finley, id.* at 558, quoted *Rust*, 500 U.S. at 193, in holding that

> Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."

The Second Circuit's response to this statement is "we doubt that these words can be reliably taken at face value." *Velazquez*, 164 F.3d at 770. This kind of judicial arrogance defies further comment. Here, Congress has chosen to selectively fund representation of welfare recipients so long as that representation does not encompass a challenge to existing laws. Under the *Rust* and *Finley* precedents, this exclusion is not viewpoint discrimination, it is merely the legislative choice as to how the welfare population may be most effectively represented by LSC grantees.

## II

## THE SECOND CIRCUIT IGNORED THE ALTERNATIVES TO LSC-FUNDED CHALLENGES TO WELFARE REFORM

### A. The Second Circuit Ignored Its Own Rulings on Congressional Restrictions on Federally Funded Services

In dismissing the *Rust* and *Finley* precedents, the Second Circuit declared that the fact that "Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests" that Congress may make grants funding legal representation of welfare applicants that "bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success." *Velazquez*, 164 F.3d at 771. The court then proclaimed: "Such a restriction is a close kin to those 'calculated to drive "certain ideas or viewpoints from the marketplace."' *Finley*, 118 S. Ct at 2179." *Velazquez*, 164 F.3d at 771-72.

In so stating, the court ignored what it had ruled earlier in the case. For example, the court noted that

> the LSCA has always limited the range of legal services available through LSC grantees. See 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services.

*Id.* at 765 (citation omitted).

The court went on to observe:

> Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

*Id.* The court made no attempt to explain why this standard did not apply to the welfare benefits litigation exclusion of Section 504(a)(16).

The court then discussed *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), wherein a nonprofit organization challenged Section 501(c)(3) of the Internal Revenue Code which prohibited organizations engaged in lobbying from receiving tax-deductible contributions. The Second Circuit noted that in upholding this limitation the opinion relied upon the fact that the Internal Revenue Code allowed Section 501(c)(3) organizations to establish financially independent lobbying affiliated under Section 501(c)(4) without jeopardizing their eligibility for tax-deductible contributions. *Regan*, 461U.S. at 544. *Velazquez*, 164 F.3d at 765.

The Second Circuit also considered *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), in which this Court invalidated a condition denying federal funds to public stations that engaged

in editorializing. This Court there found that Congress could cure the statute by amending it to permit stations to establish affiliates which could use the stations' facilities to editorialize with nonfederal funds. *Id.* at 400. *Velazquez*, 164 F.3d at 765-66.

The Second Circuit also discussed *Rust*, 500 U.S. 173, in this context, stating:

> In *Rust*, as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. *See id.* at 180-81.

*Velazquez*, 164 F.3d at 766. The court noted that both under Title X and OCRAA, grantees could provide restricted activities if separate entity requirements were met. *Id.* at 767 n.5.

The Second Circuit concluded upon consideration of these cases that

> in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression.

*Id.* at 766. That should have confirmed the constitutionality of the statute.

**B. The Second Circuit Failed to Consider the Alternatives Available to Welfare Recipients Seeking to Challenge the Law**

Notwithstanding its own analysis and that of the cases it had just relied on, the Second Circuit invalidated the welfare benefits litigation limitation, overlooking the dispositive criteria

set forth by this Court. The Ninth Circuit in *LASH* pointed out the obvious factors that were ignored by the court below:

> First, a recipient is not compelled to accept a subsidy from the LSC. A recipient can decline the federal subsidy and avoid being subject to the restrictions. *See, Rust,* 500 U.S. at 199 n.5; *Grove City College v. Bell,* 465 U.S. 555, 575 (1984) (conditioning federal assistance on compliance with a federal program does not violate petitioner's First Amendment rights because the recipient "may terminate its participation in the [program] and thus avoid the requirements of [the program]"). By choosing to accept LSC funds, "a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income," *Rust,* 500 U.S. at 199 n.5. Second, the LSC regulations only govern recipients of LSC funds and any related entities that fail to satisfy the program integrity requirements. If the recipient wishes to engage in prohibited activities, it remains free to use private funds to finance these activities if it complies with the separation requirements of § 1610.8.

145 F.3d.

The Second Circuit, in failing to consider these criteria, missed the point that because welfare rules may not be challenged by LSC grantees, it does not mean they must go unchallenged. State and local governments, public interest law firms, pro bono practitioners, among a myriad of legal sources, are available to challenge unlawful welfare rules and statutes. None of these alternative resources were contemplated by the Second Circuit's limited view of the law.

Instead, the panel majority took issue with Judge Jacob's dissent that the statute merely prohibits LSC lawyers from taking on certain representations. The majority opined that

"[a]s a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses." *Velazquez*, 164 F.3d at 772. Since the arguments in question would be the constitutionality of welfare reform laws that preclude or limit benefits to the potential client, this type of matter is highly unlikely to be raised by the opposition. Rather, it is likely to be raised, if at all, in the first instance by the plaintiff. And it would be an ill-schooled attorney indeed who failed to realize at the initial client interview that the bar to the client's claim was a welfare reform law, the validity of which must be challenged in order for the client to prevail. At that point, the LSC attorney is bound by law and ethics to decline representation. But that does not create a constitutional violation. As the majority said in an earlier context:

> We find that plaintiffs' allegations are insufficient to sustain a facial challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. . . . Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms.

*Id.* at 767. The court should have taken its own counsel with regard to the facial attack on Section 504(a)(16). There is no

evidence to support the court's prediction that counsel will be unable to determine that a case falls within the excluded category and decline representation. The plaintiffs' facial attack should have been rejected out of hand.

### C. LSC Clients Are No More Disadvantaged by the Exclusion Than if Congress Had Not Provided Any Funding for Legal Services

This Court noted in *Harris v. McRae*, 448 U.S. 297, 314 (1980):

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.

Here, indigents desiring to challenge the constitutionality of welfare laws similarly suffer no disadvantage if LSC grantees may not represent the indigent in such challenges. The indigent continues, as before, to be dependent on the private sources noted above for those services or, as *McRae* summarized, *id.* at 317, the exclusion

> leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize no health care costs at all.

Welfare recipients similarly are left with the same range of choice in deciding whether to challenge welfare reform laws as they would have if Congress had made the determination not to subsidize LSC at all. As with the circumstances in *McRae*, there is nothing unconstitutional in this statutory exclusion.

## CONCLUSION

In exercising its legislative discretion, Congress determined that the needs of welfare recipients would be best served if LSC attorneys concentrated on representing the individual interests of those recipients under existing law. Therefore, Congress directed that LSC grantees not engage in such glamorous, expensive and resource-consuming exercises as class actions and challenging the constitutionality of welfare reform laws. Such laws may be alternatively challenged, of course, by other legal representatives of welfare recipients such as public interest law firms or pro bono counsel. Because these alternatives exist, Congress is free to restrict LSC grantees in the types of litigation which they may conduct without violating the First Amendment. The opinion of the Second Circuit should therefore be reversed.

DATED: June, 2000.

Respectfully submitted,

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Nos. 99-603 and 99-960

# In the Supreme Court of the United States

LEGAL SERVICES CORP., *Petitioner,*
v.
CARMEN VELAZQUEZ, ET AL., *Respondents.*

UNITED STATES OF AMERICA, *Petitioner*
v.
CARMEN VELAZQUEZ, ET AL., *Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321–55 violates the First Amendment, because it precludes recipients of Legal Services Corporation funds from participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system" but allows representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

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## INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation. WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving the validity of restrictions on Legal Services Corporation (LSC) funds and the proper administration of welfare programs. *See, e.g., Legal Aid Soc'y of Hawaii* v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998); *Saenz* v. *Roe*, 526 U.S. 489 (1999).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions.

*Amici* submit this brief in support of Petitioners and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

## SUMMARY OF ARGUMENT

This case illustrates the truth of the adage, "No good deed ever goes unpunished." When Congress decided to prohibit LSC fund recipients from attempting to upend welfare laws, it generously carved out an exception to let poor Americans receive free legal assistance in seeking welfare benefits. To prevent its generosity from being used to subvert its prohibition, Congress limited the exception to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

individual suits for welfare relief and expressly prohibited LSC fund recipients from using such suits to attack welfare laws. This and other restrictions were challenged on First Amendment grounds, and the Second Circuit upheld the generosity but struck down the proviso as viewpoint discrimination. For three reasons this Court should reverse.

First, the suit-for-benefits exception comfortably falls within this Court's government subsidy decisions. Those decisions establish that Congress holds broad power to attach limitations on the programs it subsidizes, even when such limitations are challenged on the ground of viewpoint discrimination. Like restrictions on tax benefits or abortion subsidies, which the Court has upheld, the suit-for-benefits exception reflects the congressional aim of confining the uses to which LSC funds may be put. Moreover, the suit-for-benefits exception neither directly regulates speech—limiting subsidies for legal representation is no more a restriction on speech than limiting subsidies for abortion services—nor imposes a criminal penalty.

Second, unless reversed, the Second Circuit's decision threatens to shift the power to define government subsidies from legislatures to courts. Concerned lest it inadvertently assume powers rightly belonging to elected representatives, the Court has traditionally cabined constitutional claims directed at forcing the government revise its subsidies in favor of the claimants. The Second Circuit's holding boils down to the contention that it is for the lawyer advising an indigent client, rather than for Congress, to decide the range of legal services in which LSC fund recipients may participate. Unless reversed, this decision will encourage others to use the First Amendment as a tool to obtain in court what they were denied in the legislature.

Third, such a revolution in our constitutional understanding is put in further doubt by the flimsiness of the viewpoint discrimination claim in this case. "Opposition to current welfare law" consists of no discernible viewpoint at all. Instead it is so capacious a concept as to include Republicans, Democrats, and Trotskyite Socialists. An idea so inclusive simply lacks the distinctiveness necessary to warrant this Court in striking down an Act of Congress on the ground of viewpoint discrimination.

## ARGUMENT

This case presents the question whether § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321–55, discriminates on the basis of viewpoint in violation of the First Amendment. According to the United States Court of Appeals for the Second Circuit, "the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." Pet. App. 35a.[2] The court attempted to anchor this holding in a peculiar reading of *Rust* v. *Sullivan*, 500 U.S. 173 (1991). "[W]e think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy." Pet. App. 32a. However, a close reading of *Rust* and the line of decisions on which it rested reveals that the Second Circuit was profoundly mistaken. The suit-for-benefits exception is fully consistent with the government's broad power

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[2] Unless otherwise noted, all citations to the Petition, Petitioner's Appendix, and Brief in Opposition refer to documents filed in No. 99-960.

to enforce limits on its subsidies, even when such limits are challenged on First Amendment grounds. To more clearly see where the Second Circuit stumbled, it is necessary to review *Rust* in some detail.

## I. THE SUIT-FOR-BENEFITS EXCEPTION FALLS COMFORTABLY WITHIN THE GOVERNMENT'S BROAD POWER TO FIX LIMITS ON ITS SUBSIDIES, EVEN WHEN SUCH LIMITS ARE CHALLENGED ON THE GROUND OF VIEWPOINT DISCRIMINATION

### A. The Suit-for-Benefits Exception Amply Satisfies the Rule of *Rust* v. *Sullivan*

*Rust* involved the facial validity[3] of Department of Health and Human Services (HHS) regulations limiting the abortion services offered by programs funded under Title X of the Public Health Services Act, 84 Stat. 1506, as amended, 42 U.S.C. §§ 300–300a-6. Section 1008 of the Act provided that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. HHS regulations implementing § 1008 attached three pertinent restrictions on the use of Title X funds. First, the regulations made it clear that a "Title X project may

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[3] That the statute was challenged on its face rather than as applied played a prominent role in deciding the case. The Court emphasized that a party challenging a law on its face bears "a heavy burden." *Rust*, 500 U.S. at 183. "'[T]he challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.'" *Id.* at 183 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). And the Court relied on that high standard as the basis for rejecting certain First Amendment claims. *See, e.g., id.* at 195, 195 n.4.

not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. § 59.8(a)(1) (1989). Accordingly, the regulations directed a Title X recipient to answer questions regarding abortion by replying that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at § 59.8(b)(5).

Second, Title X projects were precluded from taking any steps to "encourage, promote or advocate abortion as a method of family planning." *Id.* at § 59.10(a). Prohibited activities, when aimed at "promot-[ing] . . . abortion as a method of family planning," *id.*, included lobbying, publishing, providing speakers, legal action, and dues-paying membership in organizations for which abortion advocacy forms "a substantial part of its activities." *Rust*, 500 U.S. at 180.

Third, the regulations mandated that Title X projects be "'physically and financially separate" from prohibited abortion activities." 42 C.F.R. § 59.9 (1989). To be deemed separate the regulations mandated that "a Title X project must have an objective integrity and independence from prohibited activities." *Id.* HHS regulations listed several factors to determine the presence or absence of "objective integrity and independence," *id.*, including "separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." *Rust*, 500 U.S. at 181.

These regulations were challenged on several constitutional grounds, among them viewpoint discrimination. It was alleged that "the regulations . . . impermissibly discriminat[e] based on viewpoint because they prohibit 'all discussion about abortion as a lawful option—including counseling, referral, and

the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192 (quoting Br. Pet. 11 (No. 89-1391)).

The Court disagreed, finding "no question but that the statutory prohibition contained in § 1008 is constitutional." *Id.* Its chief reason for doing so lay with the following principle:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Id.* at 193. To justify its reliance on this rule, the Court established two lines of defense.

First, the Court set out those principles that had traditionally governed its decisions regarding the validity of government subsidies. 1. A refusal to fund an activity is not equivalent to a penalty on that activity. *See id.* 2. Government interference with a constitutionally protected activity differs from the government's encouragement of only those activities that conform with its policy. *See id.* 3. If the government unconstitutionally discriminates based on viewpoint whenever it sets limits on what activities it funds, numerous government subsidies would be "constitutionally suspect." *Id.* at 194. 4. When the government subsidizes a single protected right, it need not subsidize "analogous counterpart rights." *Id.* Taken together, these principles mean that "[w]ithin far broader limits than petitioners are willing to

concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.*

Second, the Court articulated its reasons for regarding § 1008 and the HHS regulations as legitimate exercises of the government's broad power to enforce limits on its own subsidies. 1. The Court described the challenged regulations as being "designed to ensure that the limits of the federal program are observed." *Id.* at 193. 2. The Court denied that the Title X regulations directly aimed at "'suppressing a dangerous idea,'" *id.* (quoting *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983), in turn quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). Instead, the Court described the challenged statute as "a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Id.* at 194. 3. On a related point, the Court distinguished *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 234 (1987), where a state sales tax was found invalid because it discriminated among magazines based on their content. "[W]e have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the project funded." *Id.* at 194–95.

Contrary to the Second Circuit, which found it "inconceivable," Pet. App. 32a, to let *Rust* decide this case, the similarities between the suit-for-benefits exception at issue here and the abortion subsidy restrictions upheld in *Rust* are striking. First, as its language demonstrates, the suit-for-benefits exception was plainly "designed to ensure that the limits of the federal program are observed." *Id.* at 193.

Section 504(a)(16) prohibits the use of LSC funds by anyone—

> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency *if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.*

The italicized words met their untimely end in the Second Circuit's buzz saw. *See* Pet. App. 28a. Yet these words manifestly serve the legitimate purpose of fixing a limit on the activities for which congressional funding is available. The exception allows LSC fund recipients to represent a single client who seeks "specific relief from a welfare agency." Congress thereby stated its willingness to subsidize legal representation for persons needing assistance to obtain welfare benefits. A poor widow could rely on this language to obtain federally subsidized legal representation in her effort to obtain Social Security benefits, for instance. However, Congress set a limit on its largesse. Not coincidentally it drew that limit at the point where the exception might swallow the rule. For that reason, the proviso virtually restates the general prohibition: LSC recipients may not transform a suit for benefits into a suit challenging current welfare laws. The suit-for-benefits exception thus bears the unmistakably imprint of Congress's design "to ensure that the limits of the federal program are observed." *Rust*, 500 U.S. at 193.

Second, the suit-for-benefits exception does not aim to "'suppress[ ] a dangerous idea,'" *id.* (quoting *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983), in turn quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). As in *Rust*, the restriction on LSC funding is accurately described as a constraint on "engaging in activities outside of the project's scope." *Id.* at 194. For that reason Congress expressed its intent using words conferring limited permission on LSC recipients to represent individual clients seeking welfare assistance but not clients seeking to change the system. However controversial as a political matter, *Rust* teaches that such selective funding decisions do not amount to an unconstitutional penalty on speech.

So much establishes that the Second Circuit misread *Rust* when it managed to find the suit-for-benefits exception invalid as viewpoint discrimination. But the lower court's mistake runs deeper than it first appears, because *Rust* was no sport. It stands in a long line of this Court's decisions, which establish beyond cavil that the government enjoys broad power to fix limits on its subsidies, even when such limits are challenged on the ground of viewpoint discrimination.

### B. The Suit-for-Benefits Exception Also Fits Within this Court's Other Government Subsidy Decisions

More than a century ago this Court established the principle that government subsidies are seldom vulnerable to constitutional attack. In *United States* v. *Realty Company*, 163 U.S. 427 (1896) the Court upheld certain bounties for sugar producers against the claim that Congress lacked the power to appropriate funds for that purpose. *Id.* at 443–44. The Court noted that "generally such a question must

in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." *Id.* at 444.

*Cincinnati Soap Co.* v. *United States*, 301 U.S. 308 (1937) reiterated that lesson in a case involving the validity of a federal tax on coconut oil to be paid into the Treasury of the Phillippines. *Id.* at 311–12. There the Court rejected the claim that this appropriation to a foreign treasury exceeded Congress's powers "to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the lawmaking department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard." *Id.* at 313 (citation omitted).

This constitutional understanding of the broad power of the legislature over public subsidies was elaborated and applied to the First Amendment in *Cammarano* v. *United States*, 358 U.S. 498 (1959). There the Court unanimously sustained Treasury regulations that denied income tax deductions for funds spent trying to defeat statewide initiatives in Washington and Arkansas. *Id.* at 499. It rejected the argument that denying a tax deduction for these purposes infringed the freedom of speech. *See id.* at 513. In support of this holding the Court emphasized the distinction so crucial in *Rust*, between selective funding and viewpoint discrimination. "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as

everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." *Id.* The Court went on to say that the challenged regulations were "plainly not "'aimed at the suppression of dangerous ideas.'" *Id.* (quoting *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958), in turn quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)). Instead the Court found that the regulation served the legitimate purpose of ensuring that "everyone in the community should stand on the same footing" regarding the purchase of advertising aimed at affecting legislation. *Id.* at 513.

*Maher* v. *Roe*, 432 U.S. 464 (1977) and *Harris* v. *McRae*, 448 U.S. 297 (1980) confirmed the Court's adherence to the rule giving legislatures broad leeway to limit subsidies—and they did it in the highly contentious field of abortion. *Maher* held that a Connecticut regulation excluding Medicaid benefits for nontherapeutic abortions did not infringe the constitutional right recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). *See Maher*, 432 U.S. at 474. The Court found that Connecticut "has imposed no restriction on access to abortion that was not already there" by virtue of the poverty of women seeking a subsidized abortion. *Id.* This conclusion was influenced by the Court's traditional understanding that policy decisions rightly belong in the hands of elected legislators. "[W]hen an issue involves policy choices as sensitive as those implicated by the public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature." *Id.* at 479. *Harris* held that the Hyde Amendment, which restricted federal funding for abortions, was consistent with the Due Process Clause of the Fifth Amendment. *See Harris*, 448 U.S. at 317. Two reasons guided the Court toward this

conclusion. First, it found that Congress had not burdened the right to an abortion when it refused to fund abortion. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* Second, the Court stressed that the presence of a constitutional right does not obligate the government to subsidize the exercise of that right.

> To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

*Id.* at 317–18 (footnote omitted).

*Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983) further clarified the Court's understanding of the relation between constitutional rights and the duty of government to subsidize them. It presented a First Amendment challenge to § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), which denies tax exempt status when a substantial part of the petitioning organization's activities consists of lobbying. *See id.* at 550–51. Taxation with Representation of Washington (TWR) argued that Congress violated the Free Speech Clause when it excluded lobbying from § 501(c)(3). *See id.* at 545. The Court stoutly disagreed, saying that it had "never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right." *Id.* This is so, the Court reasoned, because, as in *Maher* and *Harris*, the financial obstacles preventing TWR from lobbying as it wished

existed because "TWR does not have as much money as it would like" and not because Congress has refused a subsidy. *Id.* at 550. The Court concluded its discussion with a ringing affirmation of the power of elected officials to structure government subsidies in the public interest. "Where governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas' . . . its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'" *Id.* at 550 (quoting *Maher*, 432 U.S. at 476 and *Cammarano*, 358 U.S. at 513).

Only two terms ago this Court had occasion to apply *Rust* in a case posing many of the same issues presented here. *NEA* v. *Finley*, 524 U.S. 569 (1998), held that 20 U.S.C. § 954(d)(1), which obligated the NEA to assess grant applications "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public," did not unconstitutionally discriminate based on viewpoint. *Id.* at 572. Certain disappointed grant applicants had argued that § 954(d)(1) violates the First Amendment on its face, "because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency." *Id.* at 580. For several reasons, the Court disagreed.

First, the Court disputed the applicants' broad interpretation of § 954(d)(1). They read it to mean that the law imposed mandatory content-based standards on the NEA. *Id.* Instead the Court found that the provision "imposes no categorical requirement," *see id.* at 581, but rather "admonishes the NEA merely to take 'decency and respect' into consideration, and . . . aim[s] at reforming procedures rather than precluding speech." *Id.* at 582.

Second, based on this interpretation of § 954(d)(1), a majority found that the applicants' facial attack failed, because the provision did not "engender the

kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Id.* at 583. Unlike the hate speech provision struck down in *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992), the Court pointed out, the "decency and respect" provision did not "set forth a clear penalty, proscribe[ ] views on particular 'disfavored subjects,' and suppress[ ] 'distinctive ideas, conveyed by a distinctive message.'" *Finley*, 524 U.S. at 582 (quoting *R.A.V.*, 505 U.S. at 391, 393).

Third, the Court distinguished the "decency and respect" provision from the student-funded subsidy at issue in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Unlike the limited public forum created by the University of Virginia in *Rosenberger*, NEA grants are competitive, meaning that the government does not "indiscriminately 'encourage a diversity of views from private speakers.'" *Finley*, 524 U.S. at 582 (quoting *Rosenberger*, 515 U.S. at 834).

Fourth, while acknowledging that the suit presented a facial challenge, the Court noted in passing that certain applications of the "decency and respect" provision would pose constitutional infirmities because such applications would cause "the suppression of disfavored viewpoints." *Id.* at 587. The provision might be at risk, for instance, "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Id.* The same result might obtain if the provision had been "'manipulated' to have 'a coercive effect.'" *Id.* (quoting *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) or if it imposed "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Id.* (quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502

U.S. 105, 116 (1991). However, the Court distinguished such cases, noting again that the nature of a facial challenge did not present them. *Id.* at 586.

Fifth, echoing its holding in *Rust*, *see* 500 U.S. at 193, the Court stated that the First Amendment does not generally preclude Congress from limiting subsidies as it thinks best:

> [A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protect rights, Congress has wide latitude to set spending priorities.

*Id.* at 587–88.

This line of cases, stretching from *United States* v. *Realty Company*, 163 U.S. 427 (1896) to *NEA* v. *Finley*, 524 U.S. 569 (1998) establishes the principle that the government enjoys broad power to enforce limits on the subsidies it provides. Section 504(a)(16)'s suit-for-benefits exception comfortably fits within that principle. It neither directly regulates speech—limiting subsidies for legal representation is no more a restriction on speech than limiting subsidies for abortion services—nor imposes a criminal penalty. Like the lobbyists in *Regan*, the would-be abortion providers in *Rust*, and the "*[a]vant-garde artistes*," 524 U.S. at 595 (Scalia, J., concurring in the judgment), in *Finley*, Respondents in this case have presented a demand for money gussied up in the language of constitutional rights. But the language of § 504(a)(16) does not warrant departing from this Court's traditional understanding that Congress holds broad power to decide what activities deserve public funding,

even when such decisions are challenged on the ground of viewpoint discrimination.

## II. UNLESS REVERSED, THE SECOND CIRCUIT'S DECISION THREATENS TO SHIFT THE POWER TO DEFINE GOVERNMENT SUBSIDIES FROM LEGISLATURES TO COURTS

From the vantage point supplied by a review of this Court's government subsidy decisions, one notices that the Second Circuit's decision is revolutionary. The consistent lodestar of previous decisions has been the Court's understanding that choosing how to spend public funds nearly always belongs in the hands of elected representatives, not courts. *See United States* v. *Realty Company*, 163 U.S. 427, 444 (1896); *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 313 (1937); *Maher* v. *Roe*, 432 U.S. 464, 479 (1977); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550 (1983); *Finley*, 524 U.S. at 588. Indeed, the Court has repeatedly framed the extent of judicial review in government subsidy cases in the narrowest possible terms. It has used the phrases "rarely, if ever," *Realty Company*, 163 U.S. at 444, and "a very plain case" *Cincinnati Soap Co.*, 301 U.S. at 313, to describe cases where a subsidy might be invalidated, while using the phrases "far broader," *Rust*, 500 U.S. at 194, and "wide latitude," *Finley*, 524 U.S. at 588, to describe the field of legislative discretion.

Members of the Court have recognized that constitutional claims, if not cabined in the context of government subsidies, will endanger democratic accountability. Justice Frankfurter aptly summarized those concerns in the following passage from his concurring opinion in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946):

> It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether the world of matter or of mind.

*Id.* at 160 (Frankfurter, J., concurring).

To guard against the danger of allowing constitutional claims to engulf the principle of democratic self-governance, the Court has erected a wall out of the following principles. 1. Government does not abridge the freedom of speech merely because it refuses to fund speech. *See Cammarano* v. *United States*, 358 U.S. 498, 513 (1959); *Harris* v. *McRae*, 448 U.S. 297, 317 (1980); *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). 2. More generally, a constitutional right does not carry with it a duty by the government to subsidize that right, since the government has no constitutional duty to remove financial obstacles that it did not create. *See Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 317; *Regan*, 461 U.S. at 550. 4. As a corollary, when the government subsidizes a single protected right, it need not subsidize "analogous counterpart rights." *Rust*, 500 U.S. at 194. 5. "Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* at 195 (citations omitted).

The lower court's decision threatens to tear down this wall. That decision holds that "the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." Pet. App. 35a. But

"existing law" means nothing more or less than the sum total of legislative decisions granting, withholding, and conditioning the receipt of welfare benefits. If opposition to these decisions qualifies as viewpoint discrimination, it is difficult to imagine a federal subsidy that remains immune from First Amendment challenge.

The decision below thus "casts doubt upon a wide variety of tax preferences and subsidies." *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). This raises serious practical questions. Must Congress now choose between funding all related activities or denying funding to any of them? If Congress may not attach a proviso to the suit-for-benefits exception, how can it prevent any subsidy from being used contrary to its intended purposes? More troubling still is the question whether the decision below will be allowed to erode this Court's consistent injunction that denying a subsidy for speech is not an abridgment of speech. The viewpoint discrimination claim here boils down to the argument that the lawyer advising an indigent client, rather than Congress, ought to determine the range of legal services in which LSC fund recipients may participate. One of its most troubling implications is that the Second Circuit's decision allows Respondents to use the First Amendment as a means of getting subsidies in court that they lost in the legislature. But that decision is wrong. This Court's decisions plainly teach that constitutional litigation should not be treated as a more highly evolved form of lobbying.

Such reservations are heightened when one discovers that, strictly speaking, the suit-for-benefits exception does not really consist of a viewpoint at all.

## III. THE SUIT-FOR-BENEFITS EXCEPTION DOES NOT CONSIST OF A VIEWPOINT FOR PURPOSES OF FIRST AMENDMENT ANALYSIS

Viewpoint discrimination captures the idea that "[e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 (1978). Or as Justice Scalia has more colorfully phrased it, the First Amendment forbids the government "to license one side of a debate to fight freestyle while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 392 (1992). Whether the suit-for-benefits exception counts as viewpoint discrimination matters because "in general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions." *Id.* at 431 (Stevens, J., concurring in the judgment).

The Second Circuit defined the relevant viewpoint as "a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal." Pet. App. 33a (footnote omitted). Respondents characterize it, on the other hand, as an effort "to subsidize pro-government speech, while withholding support from anti-government speech." Br. Opp. 7. The court's definition breaks down into the following parts: (1) an argument that a law obstructing a client's claim for welfare benefits is somehow unlawful; (2) made by a lawyer; (3) before a court of law. Leaving aside the potentially diverting questions of whether the lawyer is the relevant speaker in this case and whether a court constitutes an expressive forum, the

whole constitutional inquiry may be brought to a screeching halt by pointing out that "opposition to current welfare laws" is no viewpoint at all.

Compare it, for example, with two recent cases where the Court employed viewpoint discrimination to strike down a law on its face. *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992) presented the question whether the following municipal ordinance was facially invalid as being viewpoint discriminatory:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The Court found little difficulty in identifying the viewpoint discrimination. "[F]ighting words' that do not themselves invoke race, color, creed, religion or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *Id.* at 391.

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court overturned a school district's decision to deny a church access to a public school for the purpose of showing religiously-oriented films on families and child-rearing. *Id.* at 394. The New York Court of Appeals had ruled that the restriction was viewpoint neutral because it did not discriminate among religions; the Court disagreed. It found that the

"critical question" was not whether all religions were treated alike, but whether religious opinions were unfavorably treated in comparison with other opinions. *Id.* In particular, the Court identified religious "views about family issues and child rearing" as the relevant viewpoint.

Both *R.A.V.* and *Lamb's Chapel* thus centered on "a distinctive idea, conveyed by a distinctive message." *R.A.V.*, 505 U.S. at 393. The municipal hate speech ordinance in *R.A.V.* permitted the use of "'fighting words'" that do not themselves invoke race, color, creed, religion, or gender'" if employed to defend "racial, color, etc., tolerance and equality," but not if the speaker opposed such tolerance and equality. *Id.* at 391. The school district rule at issue in *Lamb's Chapel* allowed access to the school for all sorts of presentations on family issues, except for religious presentations. *Lamb's Chapel*, 508 at 394.

Given these precedents, the proviso contained in the suit-for-benefits exception is not a viewpoint: it does not qualify as "a distinctive idea, conveyed by a distinctive message." *R.A.V.*, 505 U.S. at 393. "Opposition to current welfare laws" is so capacious a concept as to embrace Democrats, Republicans, and Trotskyite Socialists. Since the potential grounds for criticizing current welfare laws are almost certainly greater than the number of welfare laws themselves, "opposition to current welfare laws" comprises not only multiple viewpoints, but countless ones.

Moreover, as Professor Greenawalt has explained, the kind of viewpoint cognizable under the First Amendment requires competitors. "One might say that a distinction between political advocacy and physics is one of viewpoint; speech with a scientific viewpoint is treated differently from speech with a political viewpoint. But this is not viewpoint discrimination in the sense of favoring one competing

point of view over another." Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 701 (1996). To be distinctive the idea behind the suit-for-benefits exception would have to exclude a discernible class of competing speakers. But the only competitors arrayed against those speakers for whom "opposition to current welfare laws" counts as a message is the class represented by the poor widow seeking to obtain Social Security benefits. And the members of that class presumably have no interest in debating the merits of welfare laws. Rather, their sole interest lies in obtaining welfare benefits to which they can assert a legal right. Because "opposition to current welfare laws" does not entail competing speakers, it is not the kind of viewpoint that qualifies for First Amendment protection.

Finally, it should be added that "opposition to current welfare laws," if allowed to count as a viewpoint for purposes of First Amendment analysis, would sanction all sorts of mischief. "Opposition to drug laws," "opposition to tax laws," and "opposition to civil service laws" are just a few of the possibilities. But nothing in the First Amendment prevents this Court from slamming the lid on Pandora's Box.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the

**Supreme Court of the United States**

LEGAL SERVICES CORPORATION,

*Petitioner,*

v.

CARMEN VELAZQUEZ, *et al.*,

*Respondents,*

UNITED STATES OF AMERICA,

*Petitioner,*

v.

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

# BRIEF OF THE NEW YORK STATE BAR ASSOCIATION, *ET AL.*, *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST[1]

*Amici curiae* are the New York State Bar Association; the Association of the Bar of the City of New York; the New York County Lawyers' Association; the Oregon State Bar; the Pennsylvania Bar Association; the Vermont Bar Association; the Brooklyn Bar Association; the Chicago Council of Lawyers; the Essex County Bar Association; the Lesbian and Gay Law Association of Greater New York, Inc.; the Women's Bar Association of the State of New York; the Association of Legal Aid Attorneys, UAW Local 2325; the Legal Aid Society of New York City; the National Organization of Legal Services Workers, UAW Local 2320; the Center for Ethics and Public Service at the University of Miami School of Law; the Center for the Teaching of Legal Ethics at William and Mary Law School; the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo Law School; the Louis Stein Center for Law and Ethics at Fordham University Law School; AARP; the Children's Defense Fund; Legal Counsel for the Elderly, Inc.; the Mexican American Legal Defense and Educational Fund ("MALDEF"); the National Association of Protection and Advocacy Systems; the National Center on Poverty Law; the National Partnership for Women and Families; the National Senior Citizens Law Center; the NOW Legal Defense and Education Fund, Inc.; People For the American Way Foundation; the Welfare Law Center; the Coalition of California Welfare Rights Organizations ("CCWRO"); the Federation of Protestant

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[1] All parties have consented to the appearance of *amici curiae* in this matter, and letters of consent have been lodged with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* state that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Welfare Agencies, Inc.; Housing Works; Low-Income Families' Empowerment Through Education ("LIFETIME"); the Massachusetts Welfare Rights Union; the Mon Valley Unemployed Committee; the National Campaign for Jobs and Income Support; North Brooklyn Welfare Education and Community Advocacy Network ("WE CAN"); the Reform Organization of Welfare ("ROWEL"); and Welfare Warriors. Brief individual statements identifying *amici* are set forth in Appendix A.

*Amici* jointly file this brief to express their collective opposition to the restriction at issue in this case, which requires lawyers who receive funding from the Legal Services Corporation ("LSC") to provide representation in public assistance cases according to "second-tier ethics," – *i.e.*, in a manner inconsistent with ordinary professional standards. The restriction requires lawyers to, in some instances, provide less than competent representation, restrict the scope of representation according to impermissible terms, and deny clients the authority to make decisions otherwise entrusted to clients. *Amici* also file this brief to express their concern about the effect of the restriction on the rights of welfare recipients and the lawful progress of welfare reform.

As the organizations that develop standards of professional conduct for lawyers and safeguard the integrity of the legal profession, *amici* bar associations are alarmed by the restriction's requirement that LSC-funded lawyers provide representation in a manner that is inconsistent with ordinary ethical and professional standards and by its intrusion upon the authority of states courts to define the ethical standards governing lawyers' professional responsibilities. Having conducted studies on and otherwise monitored unmet legal needs of the poor in their regions, *amici* bar associations are painfully aware that there are not sufficient alternative resources for civil legal representation

for the poor. Thus, the restriction creates a Hobson's choice – the poor may have lawyers who are forced to operate according to second-tier ethics and practice, or none at all.

Like the bar associations, *amici* law school legal ethics centers are concerned about the intrusion into the code of ethics governing the legal profession that the restriction represents. *Amici* law school legal ethics centers join the bar associations in their analysis of the restriction as requiring LSC-funded lawyers to either provide sub-standard representation, or decline representation in cases concerning public assistance.

*Amici* legal services organizations and not-for-profit legal organizations are greatly concerned about the effect of the restriction on lawyers' ability to zealously represent their clients, and to help the states implement welfare reform in a manner that is consistent with state and federal legislative and constitutional requirements. *Amici* know from experience that constitutional and statutory arguments are necessary in a broad variety of cases, and that the need to raise such arguments on behalf of a particular client cannot always be identified in advance. In their concern about the impact of the restriction on their clients, these organizations are joined by the remaining *amici*, all of whom fear the impact of the restriction on the most vulnerable in our society and reject the notion that lawyers for the poor must operate according to a second-tier code of ethics and practice.

## STATEMENT OF THE CASE

*Amici curiae* rely on the Statement of the Case submitted by Respondents Carmen Velazquez, *et al.*

## SUMMARY OF ARGUMENT

In 1996, Congress took the unprecedented step of enacting legislation which prohibits LSC-funded lawyers from raising certain legal arguments on behalf of poor persons seeking public assistance. This legislation does not prohibit lawyers receiving federal funds from representing poor persons seeking public assistance. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16); 110 Stat. 1321-55 at 1321-55 to 1321-56 (the "1996 Act") ("[The provision] shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation"). Rather, it prohibits lawyers from raising certain arguments on those persons' behalf. In particular, the legislation prohibits LSC-funded lawyers from "initiat[ing] legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." *Id.* *Amici* refer to the prohibition herein as the "welfare restriction" or the "restriction," and arguments which are prohibited pursuant to it as "restricted arguments."

Pursuant to the restriction, lawyers who receive LSC funds may represent individual clients seeking a broad variety of public benefits, but during the course of such representation may not apprise courts of constitutional or statutory infirmities in the statutes or regulations that govern these programs. The restriction applies to representation of clients seeking benefits that include Supplemental Security Income, Medicaid, Food Stamps, Temporary Aid to Needy Families, and other categories of public assistance. *See* 45 C.F.R. § 1639.2 Thus, those affected by the restriction

include poor children and elderly persons, disabled persons, and poor mothers with dependent children.

As is set forth in Part I below, the welfare restriction intrudes directly into the manner in which lawyers represent their clients, imposing limits that are inconsistent with prevailing professional standards and impeding lawyers' ability to provide effective and zealous representation. As a consequence, LSC-funded lawyers are required to provide representation that is second-tier, because they must restrict the scope of representation in a manner that would otherwise be impermissible, forego arguments despite their professional judgment of the value of those arguments, and deny clients the authority to make decisions otherwise entrusted to clients under the applicable ethical rules.

As is set forth in Part II, the pernicious effects of the restriction are particularly severe in rural areas of the country, where the poor have no real choice but to accept restricted representation by LSC-funded lawyers because there are no alternative sources of civil legal representation. In addition, the restriction has the effect throughout the country of impeding the lawful progress of welfare reform, because it prevents lawyers from apprising state agencies and courts of inconsistencies between new laws and regulations, on the one hand, and state or federal statutory and constitutional requirements, on the other. As a result, the restriction threatens the integrity of our legal system as a whole, leaving entire bodies of law to develop in a manner that is inconsistent with federal and state constitutions and governing statutes. For all of these reasons, *amici* respectfully submit that the judgment of the Court of Appeals should be affirmed.

## ARGUMENT

### I. THE WELFARE RESTRICTION FORCES LSC-FUNDED LAWYERS TO PROVIDE REPRESENTATION THAT IS INCONSISTENT WITH ORDINARY PROFESSIONAL STANDARDS.

In creating the Legal Services Corporation, Congress made clear its intention that LSC-funded lawyers should serve in accordance with ordinarily applicable professional standards. *See* Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (1974), 42 U.S.C. § 2996(6) ("[A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."); *id.* § 2996e(b)(3) (LSC "shall not, under any provisions of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys assisted under this subchapter the authority of a state or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdictions. . . . [LSC] shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities."); *id.* § 2996f(a)(1) (LSC must "insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients."). The welfare restriction, however, is completely at odds with these prior congressional directives, because it makes it impossible for LSC-funded lawyers to represent

welfare recipients or applicants in a manner that is consistent with ordinary professional standards.

The tension between lawyers' ordinary professional responsibilities and the welfare restriction stems from the fact that the restriction assumes that cases in which constitutional and statutory claims will need to be raised constitute a discrete category of cases that can be identified in advance. *See Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 775 (2d Cir. 1999) (Jacobs, J., dissenting) ("The statute nowhere contemplates that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place."). This assumption is erroneous. The reality is that legal arguments are not so easily segregated. Constitutional and statutory claims arise not just in "test" cases or "broad-based litigation challenging welfare reform," *Brief for Petitioner Legal Services Corporation* at 16, but also in run-of-the-mill cases on behalf of individual litigants.

Individuals seeking representation to challenge the denial or termination of public assistance benefits may possess a variety of potential legal claims, some of which may be unrestricted – such as challenges to the evidentiary basis of an administrative decision or to an agency's interpretation of the governing regulation or statute – and some of which may be restricted – such as challenges to the legality of the statute or regulation itself. Lawyers, however, will not necessarily be able to identify the precise mix of these claims at the outset of representation, before they have gathered facts about the case and investigated the applicable law. *Cf. Nix v. Whiteside*, 475 U.S. 157, 190 (1986) (Stevens, J., concurring) ("From the perspective of an appellate judge, a particular fact may be as clear and certain

as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel."). Some constitutional claims, for example, those implicating the fairness of the process itself, arise only after representation has commenced. *See, e.g., Ortiz v. Eichler*, 794 F.2d 889, 895 (3d Cir. 1986) (challenge to state's consideration of adverse statements from declarants unavailable for cross-examination at fairness hearings); *Meachem v. Wing*, 77 F. Supp.2d 431 (S.D.N.Y. 1999) (challenge to adequacy of state processes for reviewing denial of Food Stamps, Medicaid, and cash assistance benefits). Other claims necessarily take form only after there has been an initial agency or court decision interpreting the particular regulation or statute at issue. *See, e.g., Baylor v. New Jersey Dep't of Human Servs.*, 235 N.J. Super. 22 (N.J. Super. Ct. App. Div. 1989) (necessity of challenging welfare regulation not apparent until after fair hearing).

The fact that every state in the nation is currently undergoing enormous change in its welfare laws increases both the complexity of the issues facing lawyers in public assistance cases and the likelihood that a constitutional or statutory argument, although not immediately apparent, will arise in a particular case. Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), which replaced the AFDC program with a block grant program called Temporary Assistance for Needy Families ("TANF"), the states now have wide discretion with respect to the provision of general public assistance, and the majority are creating entirely new welfare systems. State TANF programs around the country have statutory requirements covering a range of subjects, including extensions of time limits, exemptions from work requirements, and treatment of

earned and unearned income. *See, e.g.*, Urban Institute, *One Year After Welfare Reform: A Description of State Temporary Assistance for Needy Families (TANF) Decisions as of October 1997* (1998) (describing differences among the 50 states in rules governing eligibility, time limits, work requirements, and benefit amounts for TANF programs); Center for Law and Social Policy and the Center on Budget and Policy Priorities, *State Policy Documentation Project,* (visited July 12, 2000) <http://www.spdp.org> (providing comprehensive side-by-side comparisons of states' TANF rules). Meanwhile, federal statutes continue to govern certain assistance programs such as Food Stamps and Supplemental Security Income, and the Medicaid program continues to contain both state and federal statutory mandates. Thus, the law governing public assistance is more complex than ever. *Cf. Richardson v. Perales*, 402 U.S. 389, 399 (1971) ("The Social Security Act['s] . . . administrative structures and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend.") (citation omitted); *DeJesus v. Perales*, 770 F.2d 316, 321 (2d Cir. 1985) (Friendly, J.) (Medicaid statute is of "unparalleled complexity"); *Rehabilitation Ass'n of Virginia v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994) ("There can be no doubt but that the statutes and provisions . . . involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience.").

In the present climate of welfare reform, to provide effective representation, lawyers who represent public assistance claimants more than ever before must consider whether the regulations or state statutes affecting their clients are consistent with constitutional and legislative requirements. However, as set forth above, as a practical matter, lawyers cannot always identify in advance and refuse representation to prospective clients who could and should

raise such arguments. Accordingly, LSC-funded lawyers must operate vis-à-vis their clients seeking public assistance according to rules unfamiliar to the ordinary practice of law. That is, if they are to represent individuals seeking public assistance, LSC-funded lawyers must advise potential clients, in accordance with the welfare restriction, that their representation may not include claims that a welfare reform statute or regulation is unlawful. Having obtained clients' assent to this condition, LSC-funded lawyers representing applicants for benefits would then forego available legal challenges to the governing laws and regulations, even if the lawyers concluded as a matter of independent professional judgment that such legal arguments would best serve their clients' interests.

Setting these terms for the representation of welfare claimants contravenes the most fundamental professional standards. The restriction, in effect, requires lawyers to agree to provide representation that might well become incompetent, in contravention of lawyers' responsibility to provide competent and zealous representation. *See* Model Rules of Professional Conduct Rule 1.1 ("A lawyer shall provide competent representation to a client."); Model Code of Professional Responsibility EC 6-1 & 7-1. *Cf. Evans v. Jeff*, 475 U.S. 717, 728 (1985) (legal aid attorney, like every other attorney, has an ethical duty "to serve his clients loyally and competently"). That is, in cases in which competent counsel would argue that claimants were denied public assistance benefits to which they were entitled because of defects in the applicable statutes or regulations or constitutionally-flawed processes, LSC-funded lawyers would be required to ignore those arguments. Similarly, in cases in which competent counsel would argue that statutes or regulations, if interpreted in ways that disadvantage clients, raise constitutional problems, LSC-funded lawyers would be required to forego those arguments, and thus be

unable to effectively draw on the well-established principle that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 508-09 (1979).

It would, of course, be professionally impermissible for lawyers to render such substandard representation in the absence of assent from clients; it is no less improper for lawyers to do so pursuant to conditions imposed at the outset of representation. *See, e.g.*, Model Rules of Professional Conduct Rule 1.2, Comment ("An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [which requires a lawyer to provide competent representation to a client] . . ."); Comm. on Professional Ethics, N.Y. State Bar Ass'n, Op. 664 (1994) (lawyer may give legal advice over telephone only if, *inter alia*, "the limited representation [does] not materially impair the client's rights").

Moreover, the welfare restriction authorizes lawyers to define the terms of the representation in a manner that denies clients authority to make decisions ordinarily entrusted to clients. Lawyers who undertake to represent clients in administrative or judicial proceedings are generally obligated to comply with their clients' directions to make non-frivolous legal arguments that go to the heart of the clients' claims or defenses. *See, e.g.*, New York Lawyers' Code of Professional Responsibility, EC 7-7 & 7-8. Therefore, if welfare claimants direct their lawyers to

challenge the relevant laws, regulations or procedures, based on counsel's advice that the legal arguments are potentially meritorious and would best promote the clients' lawful objectives, lawyers ordinarily have a professional obligation to comply.

Professional standards, in New York and elsewhere, ordinarily bar lawyers from requiring clients to relinquish this authority at the outset of the representation. *See, e.g.*, Comm. on Professional Ethics, N.Y. State Bar Ass'n, Op. 719 (1999) (matrimonial lawyer may not condition representation on client's agreement to withdraw from the representation if client fails to follow all the lawyer's instructions and advice or fails to approve and engage the expert recommended by the lawyer). Yet, the welfare restriction forces precisely this type of concession from clients.

The impropriety of limiting representation to exclude restricted arguments, irrespective of lawyers' professional judgment as to their value and clients' direction, is compounded by three additional concerns: first, the restriction emanates from a third party that is funding the representation; second, as a practical matter, clients have no alternative source of representation; and third, clients are unable to make an informed choice as to the consequences of accepting the restricted representation.

The first of these additional concerns is, perhaps, the most grave. In general, lawyers may not "serve two masters." The duty to provide clients undivided loyalty ordinarily prevents lawyers from compromising the quality of their representation or the independence of their judgment based upon who is paying the fee. *See, e.g.*, Model Rules of Professional Conduct Rule 1.8(f)(2) (a lawyer may not accept compensation from a third party for representing a

client unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); Model Rules of Professional Conduct Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment"). *Cf. Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (lawyer must exercise independent judgment regardless of pressures from third party who "recommends, employs, or pays him to render legal services to another").

That welfare claimants have, as a practical matter, no alternative source of legal representation, *see* Part II *infra*, compounds the ethical problems raised by the restriction. Ordinarily, in situations in which lawyers seek clients' consent to depart from the conventional rules governing attorney conduct (*e.g.*, to represent multiple clients or to disclose client confidences), lawyers may not secure client consent by coercion or take advantage of pressure from other sources. Where, as will generally be true, public assistance applicants are put to the choice of either LSC-funded, restricted representation or no representation at all, clients' decisions to forego otherwise available legal arguments cannot truly be viewed as voluntary and thus are not ordinarily countenanced by our legal system. *See, e.g.*, Comm. on Professional and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 2 (1997) (minor client's consent to disclose confidences must be voluntary, which is unlikely to be the case if "the minor perceives, accurately or not, that in the absence of consent, he will not be able to secure legal assistance").

Third, and finally, prior to the outset of representation, welfare claimants simply cannot make a reasonably informed decision whether to be represented subject to the welfare restriction. Ordinarily, when the representation of clients may be limited by lawyers'

responsibilities to others, lawyers may not take on clients unless they first conclude that the representation will not be adversely affected and then consult with the clients concerning the relevant benefits and risks. *See, e.g.* Model Rules of Professional Conduct Rule 1.7(b). Here, however, prospective clients must decide whether to retain LSC-funded lawyers, subject to the welfare reform restriction, without a meaningful understanding of the consequences of that decision.

This dilemma is particularly grave because of the danger that the doctrine of claim preclusion may prevent welfare recipients who accept the services of LSC-funded lawyers from raising restricted arguments in separate actions. That is, even if clients are able to find unrestricted counsel to help them raise restricted claims in separate proceedings, because those proceedings would arise from the same termination or denial of benefits, the doctrine of claim preclusion could well prevent clients from splitting claims in this fashion. *See* Restatement (Second) of Judgments, §24 (1982) (final judgment extinguishes all claims against a defendant "with respect to all or any part of the transaction or series of connected transactions out of which the action arose"); *id.* § 25 (final judgment extinguishes all claims even if plaintiff is prepared to present "grounds or theories of the case not presented in the first action").[2] *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982).

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[2] Although many jurisdictions recognize an exception to the doctrine of claim preclusion based on jurisdictional limitations of the first forum, *see* Restatement (Second) of Judgments § 26(1)(c); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), *amici* are aware of no jurisdictions that allow litigants to avoid the consequences of claim preclusion due to restrictions that funders have placed on counsel's ability to raise claims.

LSC-funded lawyers who undertake to represent clients seeking public assistance, initially believing, perhaps, that their cases do not raise statutory or constitutional claims, also run afoul of ordinary professional standards if it later appears that restricted arguments should or must be made. In such situations, LSC-funded lawyers would have two options, neither of which accords with ordinary professional standards. One possibility is to terminate the representation. Having commenced legal engagements, however, lawyers are limited in their authority to end them. Unless there are other lawyers available to step in, which will rarely be the case in this context, *see* Part II, *infra*, lawyers may not seek to withdraw unless there is good cause to do so. *See, e.g.*, Model Rules of Professional Conduct Rule 1.16(b)(6). Good cause for terminating representation, however, has never before included a standing directive from a third party, here the government, that lawyers may not make viable legal arguments that their clients desire them to make and that, as a matter of professional judgment, they believe ought to be made in order to promote the clients' lawful objectives. [3]

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[3] After the 1996 Act went into effect, Florida Rural Legal Services, Inc., an LSC-funded entity, made arrangements to transfer approximately 300 immigration cases that, pursuant to the 1996 Act, it could no longer undertake, to the Legal Aid Society of the Orange County Bar Association, a non-LSC funded entity. However, because the Orange County Bar Association did not receive funding to establish an immigration project until September 1996, and did not staff the project until January 1997, these cases were not transferred – and no work was done on them – for a period of at least six months. Legal Services Corporation, *Office of the Inspector General, Compliance with Selected Regulations Performance Audit, Final Audit Report No. AU96-063C* (Sept. 1997). The Florida example demonstrates that, even if there is an alternative organization to which restricted cases may be transferred, clients are prejudiced by their original lawyers' inability to continue their representation by, among other problems, concomitant delays.

The other possibility is to continue to represent the client but to decline to make the restricted legal argument, without the clients' knowledge and consent, over the clients' objection, or pursuant to client consent secured by a threat to terminate the representation. Any of these approaches contravenes the ordinary responsibilities of lawyers to render competent representation, Model Rule 1.1; to accede to clients' lawful direction with respect to decisions entrusted to clients, *see, e.g.*, New York Lawyers' Code of Professional Responsibility, EC 7-7 & 7-8; and to act in clients' best interests and in accordance with clients' lawful objectives. New York Lawyers' Code of Professional Responsibility, DR 7-101(A)(1) & EC 7-9.

In sum, the welfare restriction forces LSC-funded lawyers to provide representation that may prove to be incompetent and to restrict representation in a manner that would otherwise be impermissible.[4] Although LSC-funded lawyers who provide representation pursuant to the restriction do not necessarily engage in sanctionable misconduct, they certainly do not provide representation

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[4] In an opinion issued in anticipation of the 1996 Act, the ABA opined that LSC-funded lawyers could represent clients in welfare cases, asking clients to agree in advance to restrictions on the scope of the representation necessitated by funding restrictions, if the lawyers believed "that there is only a small chance that practice restrictions will adversely affect a representation in the future." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 399 (1996). The ABA opinion, of course, did not opine that the restriction was consistent with ordinary professional standards. Significantly, in an analysis issued after the restriction went into effect, the Association of the Bar of the City of New York concluded that the restriction was inconsistent with basic principles of professional responsibility. It specifically found that the restriction was in conflict with lawyers' responsibilities to exercise independent professional judgment and to provide competent representation. *See* Association of the Bar of the City of New York, *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 The Record No. 1 13, 54-59 (1998).

consistent with ordinary professional standards. Accordingly, *amici* respectfully submit that this Court should reject the welfare restriction's *de facto* redefinition of LSC-funded lawyers' professional responsibilities in cases involving public assistance.

## II. THE SCARCITY OF ALTERNATIVE CIVIL LEGAL REPRESENTATION GIVES THE POOR LITTLE CHOICE BUT TO ACCEPT RESTRICTED REPRESENTATION AND THREATENS THE LAWFUL PROGRESS OF WELFARE REFORM.

If there were ample alternative sources of civil legal representation for the poor, the conflict between the welfare restriction and lawyers' ordinary professional responsibilities perhaps would not be cause for such great concern. However, the reality is that there are not sufficient alternative sources of representation, and in fact in certain parts of the country there is practically *no* other source of civil legal representation. As a consequence, low-income persons in need of legal assistance with respect to public benefits have little choice but to accept representation from LSC-funded lawyers, governed by the welfare restriction, and LSC-funded lawyers have little choice, as a practical matter, but to accept such cases. At a time when the nation's welfare laws are in an unprecedented state of flux, the restriction does damage not only to low-income clients and LSC-funded lawyers, but also to the evolution of the laws with respect to public assistance. That is, at precisely the time when states are engaged in sweeping welfare reform, and are thus in need of assistance in assuring that state legislative and constitutional directives are complied with, those lawyers most able to provide such assistance, on account of their caseload and expertise, are prohibited from bringing to light constitutional and statutory infirmities in new laws and regulations and thus assisting in the lawful progress of welfare reform.

That alternative sources of civil legal representation for the poor are insufficient to compensate for a loss of LSC funding in the public assistance area is not seriously

contested. Current studies find that between 70 and 90 percent of low-income persons' legal needs already are not being met. Legal Services Corporation, *Strategic Directions 2000-2005* 1 (Jan. 2000) ("*LSC Strategic Directions*") ("Of those needing legal assistance, it is estimated that less than one out of four have access to a lawyer."); Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress* 12 (Apr. 2000) ("*LSC Special Report*") (citing legal needs studies done by Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Nevada, New York, and Virginia).[5]

Local legal services programs report that, due to limited resources, they are forced to turn away tens of thousands of people with critical legal problems. *LSC Special Report* at 13. In 1993, when funding for legal services was higher than it is today, programs reported that a lack of resources required them to turn away nearly half of those seeking assistance. *Id.* In sum, funding for legal services for the poor, even given the contribution by LSC, does not come close to meeting existing need.

If one excludes LSC moneys, which comprise approximately 39 percent of funds for civil legal services nationally, the picture becomes even bleaker. *See* American Bar Association, Committee on Legal Aid and Indigent

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[5] *See also* American Bar Association, *Legal Needs and Civil Justice: Major Findings from the Comprehensive Legal Needs Study* 23 (1994) (71 percent of low-income households' legal needs not met); The Florida Bar, *Access to the Legal System* (July 1999) (80 percent of state's legal needs not met); D. Michael Dale, *The State of Access to Justice in Oregon, Part I: Assessment of Legal Needs (Draft Report)* (March 2000) (83 percent of state's legal needs not met); Wisconsin Trust Account Foundation, *What Is Needed* (1996) (90 percent of state's legal needs not met).

Defendants and The National Legal Aid & Defender Association, *The SPAN Update: A Guide to Legal Services Planning* (Jan. 1999) (*"SPAN Update"*), also available at <http://www.abanet.org/legalservices/span.html>. It would be difficult to overstate the importance of LSC funds to legal services in rural states in particular. For example, Alabama and Mississippi together are home to a poverty population of nearly 1.5 million people. Legal Service Corporation, *LSC Funded Programs* (1999), available at <http://www.lsc.gov>. In these states, LSC provides over 90 percent of the funds for legal services for the poor. *LSC Special Report* at 8; *SPAN Update*. In another four states, Arkansas, New Mexico, South Dakota, and Wyoming, the LSC grant constitutes over 80 percent of the funding available for legal services. *LSC Special Report* at 8. In 16 other states, LSC funds constitute over 50 percent of available funds. *Id.* Thus, in a total of 22 states, the majority of funds available for civil legal services for the poor comes from the Legal Services Corporation. As a consequence, poor persons in these states in need of representation with respect to public assistance are unlikely to obtain representation that is not subject to the welfare restriction.

Moreover, this is true not only in these 22 states, but also in many others where the availability of substantial non-LSC funds for civil legal services suggests, inaccurately, that the poor have an option of unrestricted representation with respect to public assistance. The numbers are deceptive because non-LSC funds are often targeted to specific categories of cases that do not include public assistance. For example, although many states appropriate funds for civil legal services, most limit the funds to cases concerning elder law, domestic violence, or family law. *See* American Bar Association, Committee on Legal Aid and Indigent Defendants Project to Expand Resources for Legal Services, *A Chart of Significant Fundraising Activities for Legal*

*Services ("PERLS")* (1999 ed.), also available at <http://www.abanet.org/legalservices/PERLS.html> (citing earmarked funds in Arizona, Colorado, Georgia, Oklahoma, and West Virginia).[6] Similarly, many states have limited the use of court filing fees and fines, an additional source of funds for civil legal services for the poor, to cases involving family law and domestic violence, or to a finite group of those seeking public assistance such as the elderly or children. *See id.* (describing funds in Illinois and Montana); *see also* 705 Ill. Stat. § 130/15; Mont. Code Ann. § 3-2-714; N.C. Gen. Stat § 7A-474.3 (limiting use of state funds to certain categories of cases, and specifically excluding representation of clients between the ages of 21 and 60 seeking public assistance). Finally, even where non-LSC funds may be used in public assistance cases, they do not necessarily hold the key to unrestricted representation. For example, in Texas, filing fee funds may be used in public assistance cases, but only where an individual is "expressly eligible" for benefits by statute or regulation. Vernon's Tex. Stat. & Codes Ann. § 51.943.

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[6] In general, many states' restrictions on the use of funds for civil legal services closely parallel those at the federal level. *See, e.g.*, Ind. Code § 33-2.1-11-4(3) (prohibiting class actions, redistricting work, lobbying, political training, or prisoner work); Md. Code 1957, Art. 10 § 45J (no class actions, lobbying, or fee-generating cases); Tenn. Code. Ann. § 16.3-808(c) (no class actions); Vernon's Tex. Stat. & Codes Ann. § 51.943 (no class actions, lobbying, acceptance of attorneys' fees, or representation of undocumented immigrants); Wash. Rev. Code Ann. § 43.08.260 (no lobbying, class actions, fee-generating cases, representation of undocumented aliens, or training programs). Overall, the trend among the states appears to be toward more, rather than fewer, restrictions on funds for legal services. Indeed, if this Court upholds the welfare restriction, it would not be surprising if states began to impose it on their funds as well. *See, e.g.*, Adrienne Schisow, *Measure Restricting Legal Aid Withdrawn*, The Daily Progress (Charlottesville, Va.), March 5, 2000, at B1, B3 (reporting that the sponsor of a Virginia State Senate bill to impose all LSC restrictions on state funds for legal services intended to reintroduce the bill in the next session).

Even if there is a source of funds for unrestricted representation in public assistance cases, however, there must also be lawyers who will take public assistance cases. Thus, the existence of non-LSC funds that can be used in public assistance cases – even to make restricted arguments – is only half of the equation. In order for those funds to be used to assist low-income persons with legal problems related to public assistance, not subject to the welfare restriction, there must be lawyers or legal organizations that do not receive LSC funds.[7]

This is because even funds that are not initially subject to the welfare restriction become subject to it when they come into the hands of any LSC-funded entity. Under the 1996 Act, LSC recipients may use "funds received from a source other than the Legal Services Corporation to provide legal assistance, [but] such funds may not be expended by recipients for any purpose prohibited by this Act." 1996 Act,

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[7] Interest on Lawyers' Trust Accounts ("IOLTA") also is a major source of non-LSC funding for legal services. Nationwide, IOLTA funds are responsible for approximately 16 percent of funding for civil legal services. *See SPAN Update.* In thirteen states and the District of Columbia, IOLTA proceeds are responsible for over 50 percent of the non-LSC funds available for legal services. *Id.* Of course, the future of IOLTA is uncertain. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (interest on client funds in IOLTA accounts is clients' private property for Takings Clause purposes). However, even if IOLTA endures as a source of non-LSC funds for legal services, it too is vulnerable to state restrictions. *See, e.g., Rules Governing the Operation of the Texas Equal Access to Justice Foundation,* Rules 13, 15 (prohibiting use of IOLTA funds in fee generating cases and class actions); Pa. Stat. Ann. tit. 62, § 4027 (no use of IOLTA funds for fee generating cases or lobbying). In addition, as set forth below, IOLTA funds are subject to the LSC restrictions in the hands of any LSC-funded entity.

§ 504(d)(2)(B). In order to use non-LSC funds for restricted purposes, such as providing unrestricted representation in a case involving public assistance, an LSC-funded entity must create a separate affiliate organization that meets LSC's onerous program integrity regulations, set forth in 45 C.F.R. § 1610, and transfer the non-LSC funds to that organization. In practice it has proven very difficult for LSC-funded organizations to do this, especially in those parts of the country where non-LSC funds and non-LSC-funded lawyers are most limited.[8] The reason for this difficulty is plain: the costs of setting up an organization that meets LSC's requirements of "objective integrity and independence" are prohibitive. *Id.* For example, in addition to requiring affiliate organizations to maintain separate accounting and timekeeping records from any LSC-funded entity, LSC's program integrity regulations require affiliates to have entirely separate physical facilities and personnel. *Id.* § 1610.8.

Thus, due to the program integrity regulations, non-LSC funds can be used in a region to provide restricted legal services only where there is a pre-existing non-LSC entity capable of taking over restricted cases, or to the extent that the funds exceed the costs of creating an entirely new

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[8] The statistics compiled by the American Bar Association and the National Legal Aid and Defender Association, based on data provided by state legal services personnel and set forth in the *SPAN Update*, confirm that there is presently no unrestricted legal services provider in 21 states (Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Wisconsin, and Wyoming) – *i.e.*, a legal services entity that does not receive LSC funds. In each of another 14 states (Idaho, Kentucky, Maine, Montana, Nebraska, Texas, Vermont, Virginia, and West Virginia), there is only one unrestricted legal services entity. *SPAN Update* (print version current to Jan. 1999, web site updated continuously and last visited July 12, 2000).

organization and paying for the rent, utilities, library, staff salaries, and supplies for that organization. *Amici* are aware of only a few states in which LSC-funded organizations have attempted or are attempting to create a program affiliate in conformity with LSC's program integrity regulations (*i.e.*, Virginia, Oregon, Alaska, and Ohio).[9] None of these attempts have been in the six states in which LSC funding constitutes over 80 percent of the total funding for civil legal services for the poor. *See* discussion, *supra* at 20. As a consequence, in these states, and in many others, there are no reliable sources of unrestricted legal services for the poor. *See* note 8, *supra*.

Moreover, even in states with substantial non-LSC funds as a percentage of total funding for legal services for the poor, individuals in remote areas who do not happen to live in proximity to an unrestricted entity have little chance of obtaining the assistance of a lawyer who is not bound by the LSC restrictions. *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337, 366 (1998) (LSC's program integrity regulations make it "virtually impossible to provide full representation to people living in outlying communities"). For example, in Georgia there are several rural agricultural counties with fewer than five practicing lawyers, and at least one county with no attorney at all. Legal Services Corporation, *Erlenborn Commission Report* 33 (2000) <http://www.lsc.gov.pressr/pr_pi.html> (visited July 12,

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[9] Only two of these organizations – in Alaska and Oregon – received formal approval from LSC of the proposed affiliate relationship. *See* November 19, 1998 letter from Legal Services Corporation to Oregon Legal Services Corporation and September 16, 1999 letter from Legal Services Corporation to Alaska Legal Services Corporation, on file with counsel for *amici*.

2000) (*"Erlenborn Report"*). Because there are no paid public defenders in these rural areas, the lawyers who are asked to provide *pro bono* civil legal services for the poor already bear the burden of providing criminal defendants with their constitutional right to counsel. *Testimony of Georgia Legal Services Program Executive Director Phyllis Holmen before the U.S. Commission on Civil Rights* 5 <http:// www.ganet.org/ga_bar/gls.html> (visited July 12, 2000).

The same is true in rural areas of other states, since as a general matter, not-for-profit legal organizations and private law firms that undertake civil *pro bono* work tend to be concentrated in urban areas. *See Erlenborn Report* at 34-35 (non-profit legal organizations not a feasible alternative to LSC-funded representation in Arkansas, Kentucky, New Mexico, and Texas because there are no such entities in rural areas).[10] Accordingly, the poor in rural states and remote areas of urbanized states have very little chance of obtaining civil legal representation for assistance with public benefits that is not subject to the welfare restriction.

The harmful effect of the welfare restriction will not be felt solely by low-income persons and LSC-funded lawyers. To the contrary, as welfare reform unfolds across

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[10] That legal services providers in some cities and states with relatively ample resources have abandoned entirely the notion of creating LSC affiliate organizations, and have instead established dual, wholly separate delivery systems for legal services – one system taking LSC funds, and the other not – is, of course, of no help to those in areas where resources are not sufficient to support two systems, or in remote areas where an unrestricted legal services entity is inaccessible. *See, e.g.*, Catherine C. Carr & Alison E. Hirschel, *The Transformation of Community Legal Services, Inc. of Philadelphia: One Program's Experience Since the Federal Restrictions*, 17 Yale L. & Pol'y Rev. 319 (1998) (describing the extensive costs of creating a wholly separate delivery system in Philadelphia that would not take LSC funds).

the country, judicial review is necessary to evaluate the legality of new laws and regulations in each and every state.[11] Cases raising restricted claims that have been successfully litigated by not-for-profit legal organizations since the welfare restriction went into effect bear out the common sense notion that new state welfare laws and regulations must be reviewed to assure that they are faithful to state and federal constitutional and legislative directives. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999) (striking down California law limiting public assistance to persons newly arrived in the state to the benefits in the state from which they had come); *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) (striking down Pennsylvania law providing lesser benefits to new residents); *Hicks v. Peters*, 10 F. Supp.2d 1003 (N.D. Ill. 1998) (striking down Illinois residency requirement for benefits); *Smith v. Commissioner of Transitional Assistance*, 729 N.E.2d 627 (Ma. 2000) (striking down regulation governing extensions of benefits to mothers with dependent children beyond specific time limit, where regulation was inconsistent with state statutory requirements); *Weaver v. New Mexico*, 945 P.2d 70 (N.M. 1997) (striking down New Mexico regulation restricting

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[11] One need not look far for examples of cases litigated by federally-funded lawyers for the poor prior to 1996 which demonstrate the significance for the lawful administration of welfare programs of constitutional and statutory arguments of the kind that are prohibited by the restriction. *See, e.g., Sullivan z. Zebley*, 493 U.S. 521 (1990); *Blum v. Bacon*, 457 U.S. 132 (1982); *Califano v. Westcott*, 443 U.S. 76 (1979); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *King v. Smith*, 392 U.S. 309 (1968); *Dion v. Commissioner, Maine Dep't of Human Servs.*, 933 F.2d 13 (1st Cir. 1991); *McCoy v. State Dep't of Health and Welfare*, 907 P.2d 110 (Idaho 1995); *Tucker v. Toia*, 371 N.E. 2d 449 (N.Y. 1977). *See generally* Susan E. Lawrence, *The Poor in Court, The Legal Services Program and Supreme Court Decision Making* (1990); Barbara Sard, *The Role of Courts in Welfare Reform*, 32 Clearinghouse Rev. 367 (Aug./Sept. 1988).

general assistance benefits to those with disabilities to twelve months as inconsistent with Americans with Disabilities Act).

While some restricted cases will continue to be brought by not-for-profit organizations and the private bar in urban areas, the resources and geographic reach of these entities are not sufficient to provide representation in the many cases around the country in which a constitutional or statutory argument is necessary. For the same reasons that LSC was needed in the first place – to provide civil legal representation on a national basis where private legal aid was inadequate – unrestricted legal representation continues to be necessary on a national basis, especially as new welfare laws are implemented in each and every state.

In the "Statement of Findings and Declaration of Purpose" that accompanied the Legal Services Corporation Act of 1974, Congress acknowledged that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws." 42 U.S.C. § 2996(4). The 1996 Act's welfare restriction stands in direct conflict with this principle. Whereas the LSC Act originally funded lawyers who could draw on the full extent of their professional skills, consistent with our government of laws, to advance their clients' interests and ensure that federal and state laws were enforced, the welfare restriction denies LSC-funded lawyers the ability to competently represent their clients in cases in which legal principles of interest to society as a whole are at stake. Not only does the restriction harm clients, but it skews the development of the law affecting those clients in a way that will leave state and federal constitutional and legislative requirements unfulfilled. In so doing, it threatens the orderly implementation of welfare reform across the nation and the very integrity of our judicial system.

## CONCLUSION

The welfare restriction forces lawyers who receive funds from LSC to provide representation in public assistance cases in a manner inconsistent with ordinary professional standards. It requires lawyers to, in some instances, provide less than competent representation, restrict the scope of representation according to impermissible terms, and deny clients the authority to make decisions otherwise entrusted to clients. In light of the scarcity of alternative sources of civil legal representation for the poor, particularly in rural states and in remote areas of all states, many low-income persons have little choice but to accept restricted representation, and LSC-funded lawyers have little choice but to provide it, rather than turn away persons seeking assistance with respect to benefits. As a consequence, not only does the restriction require low-income persons to accept second-tier legal representation and leave them with few ways to enforce their constitutional and statutory rights, but it threatens the lawful progress of welfare reform throughout the nation. For all of these reasons, *amici curiae* respectfully urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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## APPENDIX A
## STATEMENTS OF INDIVIDUAL *AMICI CURIAE*

**The New York State Bar Association** is the largest voluntary state bar association in the country, consisting of 67,000 members. Among the Association's purposes are facilitating the administration of justice and promoting the highest standards of professionalism among attorneys.

**The Association of the Bar of the City of New York** is a 21,000 member organization, founded in 1870, which addresses issues of law, legal ethics and public policy at the local, national and international levels.

**The New York County Lawyers' Association**, founded in 1908, currently has almost 9,000 members. It sponsors activities including *pro bono* programs, continuing education and public forums, and has consistently supported funding for legal services and the independence of the judiciary.

**The Oregon State Bar**, established in 1935, is a mandatory bar organization with approximately 11,100 active members. It administers a legal services program through which state court filing fee revenues are collected and distributed to fund legal services for the poor throughout the State of Oregon. In so doing, it seeks to ensure that funded legal service providers deliver a broad range of high quality legal services to low-income Oregonians in a cost-effective and efficient manner. It therefore has an interest in ensuring that the legal services providers it funds can provide the full range of representation other lawyers can provide for clients. Issue-based restrictions on the scope of representation imperil the Oregon State Bar Legal Services Programs' mission to provide high quality representation to all low-income

Oregonians in the most cost-effective and efficient manner possible.

**The Pennsylvania Bar Association** is a voluntary bar association founded in 1895. It has over 27,000 members.

**The Vermont Bar Association** was founded in 1878 to, among other things, promote reform in the law and to facilitate the administration of justice.

**The Brooklyn Bar Association**, established in 1872, has 2,400 active members, including members of the judiciary and practicing attorneys. For ten years, it has maintained a separate organization, the Brooklyn Bar Association Volunteer Lawyers Project, Inc., committed to providing indigent clients with *pro bono* civil representation.

**The Chicago Council of Lawyers**, formed in 1969, is a public interest bar association with 1,200 members. Within its mission to improve the administration of justice, the Council seeks to increase the access to justice of all persons.

**The Essex County Bar Association**, incorporated in 1898, has a membership of 3,000 attorneys in Essex County, New Jersey. It has a long-standing involvement with and commitment to issues as they relate to the delivery of legal services to the poor.

**The Lesbian and Gay Law Association of Greater New York, Inc. ("LeGaL")** is a 20 year-old professional association of the lesbian, gay, bisexual, transgender legal community in the New York metropolitan area with almost 500 members. Many LeGaL members are Legal Services lawyers.

**The Women's Bar Association of the State of New York ("WBASNY")** is the largest bar association in the United States specifically devoted to the advancement of the rights of women and ensuring equality and fair treatment for women. WBASNY is concerned about the detrimental and disproportionately harmful impact the LSC restriction will have upon women.

**The Association of Legal Aid Attorneys ("ALAA"), UAW Local 2325**, founded in 1969, has 800 members employed as staff attorneys at the Legal Aid Society of New York City. Comprised of lawyers who defend the constitutional rights of the poor, ALAA is committed to defending against all attacks on constitutional rights.

**The Legal Aid Society of New York City** is the oldest and largest provider of free civil legal services to indigent clients in the United States. The Society serves as counsel every year to thousands of individuals and families who challenge the denial of state or federal public assistance benefits. To permit the Society to represent its clients adequately in the wake of the welfare reform restriction, the Society turned down over $1.2 million in federal LSC funding in 1996.

**The National Organization of Legal Services Workers, UAW Local 2320**, is a labor organization composed of attorneys, paralegals and support staff employed by public interest organizations that provide civil and criminal representation to indigent clients.

**The Center for Ethics and Public Service at the University of Miami School of Law** is an interdisciplinary project devoted to the values of ethical judgment, professional responsibility and public service in law and society.

**The Center for the Teaching of Legal Ethics** was established at the William & Mary Law School in 1995 to foster the creative and effective teaching of legal ethics.

**The Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo Law School** sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral standards and issues of professional responsibility. A central focus of the Ethics Center is working to increase access to justice for all persons.

**The Louis Stein Center for Law and Ethics, based at Fordham University School of Law**, sponsors programs, develops publications, and supports scholarship on contemporary issues of law and ethics. In recent years, the Stein Center and affiliated Fordham University Law School faculty have examined ongoing developments in federal welfare law, professional and ethical issues in the work of lawyers for low-income clients generally, and the implications of LSC funding restrictions on these lawyers' work in particular.

**AARP** is a nonprofit membership organization of more than 34 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. In recognition of the significant need of the low-income older population for legal representation, AARP has consistently supported LSC programs and opposed the imposition of unreasonable restrictions that hamper the abilities of LSC lawyers and advocates to adequately and ethically represent the interests of their clients.

**The Children's Defense Fund ("CDF")**, a private nonprofit organization supported by foundations, corporate grants, and individual donations, exists to provide a strong and effective voice for the children of America who cannot vote, lobby, or

speak for themselves. CDF pays particular attention to the needs of poor, minority, and disabled children.

**The Legal Counsel for the Elderly, Inc. ("LCE")**, is a non-profit organization which is sponsored by the AARP Foundation and AARP. Currently, LCE receives no funding from the Legal Services Corporation. LCE annually provides free and reduced fee legal services to about 7,000 residents of the District of Columbia, including residents of nursing homes and group homes.

**The Mexican American Legal Defense and Educational Fund ("MALDEF")** is a national nonprofit organization established in 1968. Its principal objective is to protect and promote the civil rights of the over 29 million Latinos living in the United States, particularly in the areas of education, employment opportunities, political access, public resource equality, education and immigration.

**The National Association of Protection and Advocacy Systems ("NAPAS")** is a membership organization for the nationwide system of protection and advocacy (P & A) agencies. P & As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings and often work closely with LSC-funded lawyers in their advocacy efforts.

**The National Center on Poverty Law**, located in Chicago, provides support nationally to advocates for low-income people through communications, journals, a poverty law library, and a web site. The Center has a small staff of attorneys who provide representation to Illinois residents on policy and systemic issues in the fields of welfare reform, workforce, public housing and community building. The Center receives no Legal Services Corporation funds. While

the Center is able to represent low income Illinoisans on policy issues related to aspects of welfare reform in a limited number of class actions or legislative or administrative initiatives, it is not able to undertake all or even most of these matters that are currently ripe for activity.

**The National Partnership for Women and Families ("National Partnership")** is a nonprofit, national advocacy organization that promotes fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Established in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to advance the rights and interests of women – especially low-income women and women of color – and their families.

**The National Senior Citizens Law Center** is a key resource for lawyers, advocates and national, state and local officials working on a wide range of issues affecting the elderly. It engages in policy advocacy and works with a nationwide network of advocates and lawyers to provide quality advice and service to older Americans and all low income individuals.

**The NOW Legal Defense and Education Fund ("NOW LDEF")** is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services aimed at eliminating gender-based discrimination and securing equal rights for women and girls. NOWLDEF has vigorously litigated cases advocating on behalf of low-income women, including *Saenz v. Roe*, 526 U.S. 489 (1999).

**People for the American Way Foundation ("People For")** is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional

rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has joined in filing this *amicus* brief because of the important legal principles at stake in this case, including access to our legal system, the rule of law, and First Amendment speech protection.

**The Welfare Law Center** seeks to protect the constitutional and legal rights of the intended beneficiaries of welfare programs. Since its founding in 1965 it has litigated numerous welfare cases, including *Goldberg v. Kelly*, 397 U.S. 270 (1970) and *Califano v. Westcott*, 443 U.S. 76 (1979), holding various welfare procedures and policies unconstitutional. The restriction challenged herein imposes great pressure upon the Center, which receives no federal funds, to provide far more representation than its privately-donated resources will allow.

**The Coalition of California Welfare Rights organizations, Inc. ("CCWRO")** is a coalition of welfare rights organizations. The majority of the Board of Directors are current and former welfare recipients. CCWRO represent recipients in over 600 administrative appeals annually, files litigation on behalf of welfare recipients, and provides legislative advocacy on behalf of welfare recipients.

**The Federation of Protestant Welfare Agencies, Inc.**, founded in 1922, is an umbrella and intermediary support organization for 250 diverse New York social service agencies that serve approximately 1.5 million people of all ages, races, and faiths. Throughout its history, the Federation has advocated and championed humane social welfare policies as well as lawful and fair welfare administration.

**Housing Works** is the nation's largest provider of housing and services for homeless people who are living with AIDS and HIV. It currently provides services to approximately 2,000 people every year.

**Low-Income Families' Empowerment Through Education ("LIFETIME")** is a grassroots organization created by student mothers at the University of California Berkeley who completed college degrees while raising their families on welfare, and who are committed to helping other low-income parents accomplish the same.

**The Massachusetts Welfare Rights Union ("MWRU")**, organized in 1989, is a chapter of the National Welfare Rights Union. MWRU is comprised primarily of low-income members and is committed to fighting for social and economic justice in the United States.

**The Mon Valley Unemployed Committee** grew out of a grassroots response to the high levels of unemployment in Southwestern Pennsylvania in the early 1980s. With over 2,000 members, it continues to advocate for and assist unemployed and underemployed workers, including those on welfare.

**The National Campaign for Jobs and Income Support** is a national network composed of 25 grass-roots membership organizations with affiliates in 40 different states. It is dedicated to helping low-income persons gain access to living wage jobs and to preserving a social safety net sufficient to keep low-income families out of poverty.

**The North Brooklyn Welfare Education & Community Advocacy Network ("WE CAN")**, founded in 1996, is a coalition of community-based groups dedicated to the

struggle for justice, equality, and real opportunities for people receiving public assistance. WE CAN provides services and support to neighborhood residents who need a safety net and those struggling to move from welfare to work.

**The Reform Organization of Welfare ("ROWEL")** is a Missouri social justice organization of over 1,800 people with low incomes and allies working to reduce poverty and prejudice through advocacy and education.

**Welfare Warriors**, based in Wisconsin, is a group of mothers in poverty fighting for the lives of mothers and children and dedicated to the creation of a government-guaranteed child support program. It has 600 members nationwide.

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Nos. 99-603, 99-960

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IN THE

# Supreme Court of the United States

October Term, 2000

LEGAL SERVICES CORPORATION,

*Petitioner,*

and

UNITED STATES OF AMERICA,

*Petitioner,*

v.

CARMEN VELAZQUEZ *ET AL.*,

*Respondents.*

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

*Amicus curiae* the American Judicature Society submits this brief in support of Respondents.

Founded in 1913, the American Judicature Society is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 86 years, the Society has been the foremost national organization speaking with a credible and independent voice on administration of justice issues.

The Society's mission includes promoting improvements in the operation of the courts and building knowledge through empirical research. The Society develops and sponsors educational programs on the justice system for law students, journalists, teachers, recent immigrants, jurors, and other citizens. It publishes *Judicature*, a bi-monthly refereed journal that contains articles on a wide range of court system issues, including recent examinations of jury reform; social science, the courts, and the law; judicial performance evaluations; and the growing impact of the new genetics on the courts. Through awards, such as the Herbert Harley Award, the Justice Award, and the Toni House Award, the Society recognizes individuals and groups for contributions to the justice system and increasing public understanding of the administration of justice.

The Society's Center for Judicial Conduct Organizations promotes the development of judicial discipline that is fair but does not compromise judicial independence. The Elmo B. Hunter Citizens Center for Judicial Selection promotes judicial selection reform to ensure a bench of the highest quality.

The Society's Center for Judicial Independence promotes a judiciary that is free to issue fair and just rulings without bowing to popular and political pressures. The Center focuses

attention on the proper role of the judiciary in relation to the legislative and executive branches of government and responds to the negative effects of misleading or politically motivated attacks on the judiciary. The Center also conducts research and produces publications that further the understanding of the threats to, and opportunities for strengthening, the independence of the judiciary. The Center develops educational programs and materials to emphasize the importance of an independent judiciary and sponsors various public education and outreach programs.

Because of its historical and continuing commitment to judicial independence and the effective administration of justice, the Society respectfully asks this Court to consider the following arguments: (1) that the restrictions placed on arguments Legal Services Corporation attorneys can raise in welfare cases are unconstitutional based on Separation of Powers and federalism concerns; or (2) alternatively, that Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA")[1] should be construed to avoid the serious constitutional questions that result from the Government's proposed interpretation.

## STATEMENT OF THE CASE

*Amicus curiae* relies on Respondents' Statement.

## SUMMARY OF ARGUMENT

It is the unique "province and duty" of the judicial branch to say "what the law is". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Separation of Powers between the political branches acting under Articles I and II and the judicial branch acting under Article III is designed, among other things, to preserve this prerogative. Congress may not limit, or curb, the arguments--most importantly constitutional

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[1] Pub. L. 104-134 § 504(a)(16), 110 Stat. 1321, 1321-55-56 (1996).

arguments--that courts may consider in deciding cases within their jurisdiction.

This case involves Section 504(a)(16) of the OCRAA ("the Appropriations Rider"). The Government interprets the Rider to mean Legal Services lawyers are forbidden to claim--or even to argue--that a particular welfare rule, regulation or provision in a statute is either unconstitutional or contrary to statutory law, including the governing welfare statute itself.[2] *If* the Rider means what the Government says it does (*but see* Point III showing it does not), it would be an unconstitutional violation of the Separation of Powers. (Point I.)

The Separation of Powers, and the protection it entails of the judicial branch's prerogative to "say what the law is", has been a key part of our Constitution from inception. The Government's construction of the Appropriations Rider is entirely antithetical to the role of the judicial branch in the

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[2] In its brief, the LSC claims that the Rider prohibits "a lawyer's argument to a court [that] a welfare reform law is unconstitutional or illegal". Br. of LSC at 18. The United States similarly says the Rider would forbid representation that would involve challenges to a welfare statute on "meritorious constitutional grounds" or "statutory challenges". Br. of United States at 28, 30.

The LSC's "final rule" on Section 504(a)(16) construed the Rider's ban on litigation involving "an effort to reform a federal or state welfare system" to preclude litigation with respect to "rules or regulations enacted as part of a reform of a welfare system". 62 Fed. Reg. 30765-77 (June 5, 1997) (*codified at* 45 C.F.R. Pt. 1639). The LSC interpreted the ban on suits for relief that would "amend or otherwise challenge" "existing law" in the Rider's proviso as relating to federal, state or local laws enacted "as an effort to reform a welfare system", or regulations promulgated thereunder pursuant to notice and comment procedures. *Id.* at 30766. (The LSC takes the position that agency *policies* may be challenged, however. *Id.* at 30766 (Preamble to Final Rule); Br. of LSC at 7.)

For ease of reference, the interpretations above are referred to as the "Government's interpretation" or "Government's construction".

Separation of Powers. It skews the adversary system and forces courts to decide cases with a hamstrung advocate on one side. Under the Separation of Powers, Congress cannot make a law that inhibits courts from carrying out their duty to evaluate statutes in light of the Constitution, which is the supreme law of the land. Nor can they hamper courts in determining whether statutes comport with one another. (Point I.)

The Government's construction of the Appropriations Rider as applied to the state courts also contravenes settled principles of federalism. (Point II.)

The constitutional questions can be avoided. The Government's construction of the Appropriations Rider is wrong or, at the least, so dubious that it should be rejected so as to avoid the resulting "serious doubt of constitutionality" on First Amendment, Separation of Powers and federalism grounds. *Ashwander v. TVA*, 297 U.S. 288, 345-356 (1936) (Brandeis, J., concurring). (Point III.)

The Appropriations Rider prohibits a Legal Services lawyer from engaging in "litigation, lobbying, or rulemaking" that involves an "effort to reform" a Federal or State welfare "system". Pub. L. 104-134, 504(a)(16), 110 Stat 1321-55-56. The plain meaning of this basic prohibition against "effort[s] to reform" a welfare "system" does not prohibit attempts to assure *compliance with law*, including the Constitution under *Marbury*.

The Rider's basic prohibition against "effort[s] to reform" a welfare "system" is followed by a proviso stating that the prohibition does not preclude a lawyer funded by the Legal Services Corporation (the "LSC") under the Legal Services

Corporation Act[3] ("LSC Act") from "seeking" "specific relief" from a welfare agency, if "such relief" does not involve:

> "an effort to amend or otherwise challenge existing law. . . ."

The Rider thus prohibits "effort[s] to reform" a welfare "system". It expressly allows suits for "specific relief" where such relief would not "amend or otherwise challenge" existing law. Properly understood, these restrictions limit only legal action that would have the effect of systemwide change. Nothing in the Rider, therefore, should be understood to prohibit any particular *arguments* in support of claims that do not attempt to "reform" a welfare "system". This understanding of the Rider not only obeys its language, but would also be faithful to the language and intent of the Legal Services Corporation Act itself.[4] The LSC's interpretation of the Rider (*i.e.,* that it bans constitutional and statutory arguments), therefore, is wrong. (Point IIIA.)

An additional defect plagues the Government's extension of its reading to preclude contentions that a welfare rule, regulation or provision in a statute is unconstitutional. Under our system, when courts consider constitutional claims, they are ensuring compliance with law--not "reforming" or "challenging" it. Congress should not be assumed to have perversely singled out constitutional contentions as beyond the pale unless it spoke with clarity. *Cf. Webster v. Doe*, 486 U.S.

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[3] 42 U.S.C. § 2996 *et. seq* (1974).

[4] As set forth at greater length in Part I of the brief of *amici curiae* New York State Bar Association *et al.*, the LSC Act mandates that Legal Services lawyers should perform their duties according to the "highest" quality of professional standards, 42 U.S.C. § 2996f(a)(1), with "full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the . . . standards of the legal profession", *id.* § 2996(6), and that the LSC should "insure" "protection of the . . . adversary process from any impairment in furnishing legal assistance to eligible clients". *Id.* § 2996f(a)(1).

592, 603 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). This it surely did not do.

However, even if the Rider could be seen as ambiguous, under *Ashwander*, in order to avoid serious problems under the Separation of Powers (this brief), and the First Amendment (Respondents' brief), as well as conflicts with the LSC Act's provisions on ethics (*amicus* brief of New York State Bar Association *et al.*), the Rider should not be construed to prohibit claims--and certainly not arguments--by Legal Services lawyers that are intended to assure compliance with the Constitution and other governing law. (Point III B.)

## ARGUMENT

### I. AS CONSTRUED BY THE GOVERNMENT, THE CONSTRAINTS PLACED ON THE ADVERSARIAL PROCESS IN WELFARE CASES RESULT IN AN UNCONSTITUTIONAL INTRUSION ON THE SEPARATE POWERS OF THE JUDICIAL BRANCH.

#### A. The Constitution Prohibits the Political Departments from Acting to Prevent, or to Inhibit, Article III Courts from Exercising Their Province and Duty to Say What the Law Is.

During colonial times and the era of the Articles of Confederation, legislatures commonly usurped the powers and ability of courts to decide cases. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). *See also The Federalist No. 48*, at 311 (James Madison) (Clinton Rossiter ed., 1961) (discussing the need for Separation of Powers because some colonial legislatures had "*decided rights* which should have been left to *judiciary controversy*"). The distinctions between legislative, executive and judicial power were blurred--and the

separate and distinct powers of courts were often plucked away by legislatures. Thus,

> "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression". *Plaut*, 514 U.S. at 219.

A sense of "sharp necessity to separate the legislative from the judicial power" "triumphed among the Framers of the New Federal Constitution". *Id.* at 221. *See also INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

As explained in the Federalist Papers, the Judicial Branch was, "from the nature of its functions", "least dangerous to the political rights of the Constitution". *See Plaut*, 514 U.S. at 223 (quoting *The Federalist No. 78*, at 465 (Alexander Hamilton)). The judicial branch, "beyond comparison the weakest . . . department", with "no influence over either the sword or the purse", was recognized as uniquely vulnerable to incursions from the other two departments. Hence, "all possible care" should be taken to guard the judiciary against "attacks" by its coordinate branches. *The Federalist No. 78* at 465-66.

Fundamental to the Separation of Powers is that Congress cannot require Article III courts to consider and enforce laws without being able to evaluate the constitutional validity of those laws. If *Marbury* means anything, it is that in deciding cases, courts cannot be compelled to "close their eyes to the Constitution". *Marbury*, 5 U.S. (1 Cranch) at 178.

Time and again, this Court has resisted the notion that Congress can recognize jurisdiction, yet at the same time limit the arguments courts can hear, especially when the forbidden arguments are constitutional ones. *See Marbury*, *supra*; *see also infra* pp. 15-18. After *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871), it is a Separation of Powers truism

that Congress may not interfere with the decision making process of the courts by dispensing with judicial review when the Constitution is at stake. *See also Plaut*, 514 U.S. at 218, 225; *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 84 (1970) (acknowledging "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function"); *see also* Henry M. Hart, Jr., *"The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic"*, 66 Harv. L. Rev. 1362, 1373 (1953) (Article III prevents Congress from telling courts *how* to decide); Martin H. Redish, *"Federal Judicial Independence: Constitutional and Political Perspectives"*, 46 Mercer L. Rev. 697, 707 (1995) ("[D]ecisional independence is the *sine qua non* of the federal judiciary's operation").

This Court applied the decisional independence principle in *Klein*, invalidating an attempt by Congress to limit this Court's ability to apply the Constitution according to its own interpretation. *Yakus v. United States,* 321 U.S. 414 (1944), is to like effect. There, this Court upheld a statutory scheme that limited the arguments courts could hear in criminal cases. But judicial acceptance of that limitation turned on the Court's confidence that those important constitutional claims would ultimately be heard by a court competent to decide them. *See* Hart, 66 Harv. L. Rev. at 1380. Here, there is no such alternative, uncompromised forum.

Similarly, Congress violates the Separation of Powers when it legislates in a way that immunizes its legislation from judicial review, or puts a thumb on its side of the scale in litigation.[5] Congress' job is to enact laws *consistent* with the Constitution. It unconstitutionally aggrandizes its own power

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[5] *See Klein*, 80 U.S. (13 Wall.) at 147-48 (Congress cannot weight decision toward itself in cases where it is a party). *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (no Separation of Powers problem where Congress exposed itself to liability).

when it passes laws and at the same time seeks to limit constitutional review of those laws.

Congress could not forbid courts to consider constitutional or statutory arguments when a Legal Services lawyer represents a plaintiff in a welfare case over which the courts have jurisdiction. Likewise, interference by Congress with the adversary system so as to alter the judicial process and substantially increase the likelihood that constitutional and statutory issues will be purged from welfare cases (*see* Point B below) violates the Separation of Powers.

If the Government's construction of the Appropriations Rider is correct, it would drive a wedge between court and counsel in a manner that degrades the courts' ability to perform their constitutional function. Just as Congress cannot require courts to turn a blind eye to the Constitution or to governing statutes, so it cannot render courts deaf to constitutional or statutory arguments by choking off a lawyer's voice to articulate them.

### B. The Rider Would Distort and Prevent the Effective Functioning of the Adversary System and Undermine the Ability of Courts to Exercise Their Province and Duty to Say What the Law Is.

The Government's construction of the Rider wreaks havoc with the adversary system on which the effective exercise of the judicial power "largely depends".[6] This undermines and distorts the courts' province and duty of finding and saying what the law is.

In the mid-1990s, welfare "as we have known it" was pronounced dead.[7] In Congress, and in the states--some on

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[6] *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation omitted).

[7] Transcript of President Clinton's Address to a Joint Session of Congress, *New York Times*, Feb. 18, 1993, at A20.

their own initiative and then all in response to the mandates of Congress--complex new welfare rules and regulations were enacted.

When it passed the Appropriations Rider, Congress reaffirmed its commitment to federal funding of legal services and recognized federally-funded lawyers would be necessary to help indigent persons cope with the complex new regulations and assure consistent enforcement. Accordingly, Congress authorized Legal Services lawyers to help implement the new rules by representing indigent litigants in court to seek payment under the new laws and regulations. However, according to the Government's interpretation, Congress, at the same time, forbade Legal Services lawyers to contend to a court that a rule, regulation, or provision in a statute is inconsistent with a state constitution, a statutory provision, or the United States Constitution.[8]

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[8] Given that this is the Government's own construction, *see* Br. of United States at 26-30, it is perplexing that petitioner United States characterizes the Rider's constitutional defects as somehow "hypothetical" and resistant to facial challenge. *Id.* at 28 n.12. As framed by the Government, every instance of Legal Services representation will require a continuing search for constitutional or statutory issues, followed by a possible denial or termination of representation if they arise, and then an (often fruitless) search for substitute counsel. Indeed, the Legal Services attorney for respondent Carmen Velazquez experienced firsthand the ethical bite of the Government's interpretation of the Rider in being forced to resign from ongoing representation and leave a client to languish without benefits. Br. of Respondents at 3. Ms. Velazquez's inability to find substitute counsel is no less concrete, *id.*, nor is the dearth of alternatives to Legal Services representation nationwide.

This is a far cry from *NEA v. Finley*, 524 U.S. 569, 583-84 (1998), cited by the United States, where the facial challenge depended on the remote possibility that an agency *might, in the future*, manipulate subjective criteria in a viewpoint-discriminatory fashion. In contrast, the Government's interpretation places a "substantial obstacle" in the way of a "large fraction" of cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992); therefore, a facial challenge is entirely appropriate. *See also City of Chicago v. Morales*, 527

### 1. By Skewing the Adversary Process and Forcing Courts to Decide Cases with a Hamstrung Advocate on One Side, Congress Violates the Separation of Powers.

The vast majority of welfare cases will be brought by Legal Services lawyers. (The blithe assumption of the dissent below and the Government's brief that other counsel can readily be found is wrong[9].) It is the most basic litigation reality that, operating under the Government's rule, courts will not be able to perform their constitutional function because they will have to do so without the uncompromised assistance of lawyers upon which our adversary system of justice depends. The Government and the dissent say this will not be the case. But lawyers who litigate cases, and judges, who regularly hear them, understand how litigation operates and why the Government's imaginary world cannot be.

As any practicing lawyer, or judge, would attest based upon life experience, the potential issues in cases do not appear in sharp focus, or in many instances at all, when the client first seeks legal assistance; indeed, issues sometimes surface for the first time long after a case begins, even when the case comes before this Court. Indigent clients retain Legal Services lawyers to bring welfare cases seeking money or other welfare benefits because they are sick, hungry, homeless, jobless, or in need of childcare--not because they wish to raise some

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U.S. 41, 55 n.22 (1999) (stating that facial challenge does not require proof that no set of circumstances exists under which statute would be valid); *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., in support of denial of *certiorari*) (same).

[9] As Part II of the brief of *amici curiae* New York State Bar Association *et al.* demonstrates, it is pure fantasy to imagine that lawyers will materialize to take up the cause of welfare claimants seeking benefits (under statutes recognized by the Government itself to be complex) if Legal Services lawyers cannot represent them. For millions of poor Americans, the "choice" of a welfare representative is brutally simple: a Legal Services lawyer, or no lawyer at all.

landmark legal issue. Again, the blithe assumption of the dissent below and the Government's briefs that all constitutional and statutory issues will be spotted at the outset is inconsistent with experience--and "the life of the law . . . has been experience".[10]

Even if the possibility of a prohibited issue *is* spotted at the outset, the Legal Services lawyer and the client will often be pressed to forego the prohibited contention and proceed without it, to the detriment of both court and client. This is so because, as shown in the accompanying *amicus* brief of New York State Bar Association *et al.*, other counsel will often not be available, and lawyer and client will realize the client will be better served with a skilled lawyer than by the client *pro se* --albeit at the cost of a valuable issue.[11] Thus, in a situation where the lawyer sees a contention that the Government says *can* be raised, and a constitutional or statutory contention that the Government says is barred, the lawyer would be under pressure to press the first contention and abandon the second. That would permit the Government to dictate its opponent's litigation strategy and destroy the "genuine" adversity that justiciability requires. *Cf. United States v. Johnson*, 319 U.S. 302, 304-05 (1943) (for one party to "dominate" a dispute destroys the "'honest and actual antagonistic assertion of rights'" "essential to the integrity of the judicial process") (citations omitted).

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[10] Oliver Wendell Holmes, Jr., The Common Law 5 (Mark DeWolfe Howe ed. 1963).

[11] Moreover, unless the Government's construction is rejected, those at risk of being sanctioned and losing the funding that keeps their organizations in existence will "'steer far wider of the unlawful zone'" and thereby further silence valuable speech about legitimate constitutional and statutory issues. *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The supposed Congressional ukase, subjecting the courts to a hamstrung lawyer on the plaintiff's side, forces courts into positions irreconcilable with their constitutionally recognized role and corrodes their Article III powers. A court may itself neglect or miss the possible constitutional and statutory issues because they are not raised. Or a court may assume (at the peril of constitutional government) that since a Legal Services lawyer has appeared, any statutory or constitutional issues have been conceded.[12]

Another possibility is that the court, knowing the Legal Services lawyer before it is hamstrung, will raise the prohibited statutory or constitutional issues with the parties *sua sponte* (with only one side able to comment), or consider the issues on its own. But courts cannot be forced by Congress to address important, complicated, and often previously unexamined issues without the benefit of full briefing--or with one-sided briefing. *See Bounds v. Smith*, 430 U.S. 817, 826 (1977) ("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation".); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) ("[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law".). Rulings produced from this skewed process are more likely to be wrong; and such a process is utterly inconsistent with the jurisprudential safeguards stemming from the case or controversy requirement.[13]

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[12] Of course this would be wrong because, as shown above, the issue might not have been recognized yet or it might have been sacrificed by a calculus that, if forced to choose, it is preferable to press the non-prohibited issue and abandon the issue the Government has taken off the table.

[13] From its earliest days, this Court has required adversaries on both sides in Article III courts. The Constitution itself requires that there be a "case" or "controversy" before the "judicial power" can be invoked. One of this Court's first acts was the unanimous denial of a request for an advisory opinion. *See* 1 Charles Warren, *The Supreme Court in United*

Still another unrealistic assumption is that it is only the Legal Services lawyer who will initially conceive of a constitutional or statutory issue, either when first discussing the matter with the client or in the midst of the litigation.

The government defendant may place statutory questions squarely at issue in defense to whatever the welfare client is arguing. Under the Government's interpretation, the Legal Services lawyer would then have to delay the progress being made toward vindication of the client's rights, interrupt the case, and cast about for another lawyer who would be free to counter the government's argument. Or, if unsuccessful in this, just turn to the court and say: "You figure it out".

Similarly, the court may raise statutory or constitutional questions as it considers other points the parties have raised. What is a Legal Services lawyer to do if, during an argument, a judge at trial, or on appeal, asks whether the government's position violates the Constitution or is inconsistent with a statute, including the governing welfare statute? Should the lawyer say: "I decline to answer on the ground it may cost my employer its LSC funding"? Or: "Please interrupt the

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*States History* 486-89 (H. Johnston rev. ed. 1926).

The term "case" "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication". *Muskrat v. United States*, 219 U.S. 346, 357 (1911). *See also Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (stating case is justiciable where there is "a dispute between parties who face each other in an adversary proceeding").

It is understood that both the effective operations of courts and fairness to litigants (particularly litigants whose special needs are recognized by the Legal Services Corporation Act) require lawyers fully armed with all potential arguments. Lawyers sharpen the "presentation of issues upon which the court so largely depends for illumination of difficult . . . questions". *O'Shea*, 414 U.S. at 494 (internal quotation omitted). For "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries". *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964).

proceedings--and thereby delay vindication of my client's rights on the matters already being litigated--so that somebody can try--often fruitlessly--to come up with another lawyer who will appear to answer your question"?

If the Government's interpretation stands, courts will be confronted with a fully armed Government lawyer on one side of welfare cases, and a Legal Services lawyer with one arm tied behind his or her back on the other. There is decided impropriety in Congress subjecting courts to a contest between half a lawyer and a fully equipped lawyer--indeed a lawyer representing powerful governments whose own rules and regulations are before the court. There may be times when playing by Marquis of Queensberry rules is unnecessary, but litigation in which constitutional issues are at stake is not one of them.

### 2. Interpreting the Appropriations Rider to Preclude or Inhibit Argument of Constitutional and Statutory Issues Prevents Courts from Performing Their Article III Function.

A fundamental tenet of our constitutional system is that Congress cannot prevent courts outright from deciding constitutional issues in cases within their jurisdiction. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 176-78; James S. Liebman & William R. Ryan, *"'Some Effectual Power': the Quantity and Quality of Decisionmaking Required of Article III Courts"*, 98 Colum. L. Rev. 696, 829 (1998). Within the tripartite division of constitutional powers,

> "[i]t is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it must be exercised in a manner inconsistent with constitutional requirements *or, what in some instances may be the same*

> *thing, without regard to them*". *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting) (emphasis added).[14]

Logic dictates the same reasoning must bar the legislature from polluting the judicial process by subjecting courts to half-arguments that ignore the supreme law.

The Government's construction of the Appropriations Rider forces courts to decide cases where the lawyer for an indigent plaintiff has one arm tied behind his or her back. Because lawyers are the primary vehicle for adversary development of issues before the court, the Government's interpretation eviscerates judicial consideration of constitutional issues in cases brought by Legal Services lawyers. For Congress to hamper the judiciary's functioning in precisely the cases and controversies that are its "province" and "duty" to decide violates the Separation of Powers. Congress cannot constitutionally ask the courts to pass over--or even attempt to guarantee that they overlook--legislative enactments that are contrary to law. *See Marbury*, 5 U.S. (1 Cranch) at 177-78; *Dickerson v. United States*, No. 99-5525, 2000 WL 807223, at *6, (S.Ct., June 26, 2000) (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-521 (1997)). Assuming Congress can bar Legal Services lawyers from bringing certain kinds of cases, what it cannot do is put Legal Services lawyers into cases and then (if the Government's interpretation is accepted) bar them from making claims--or even arguments--based upon the Constitution or statutory law.

Separation of Powers requires one branch not undermine or impair the performance of another. *See CFTC v. Schor*, 478 U.S. 833, 851 (1986); *Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to

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[14] Though Justice Rutledge wrote in dissent, "[this] Court, the canonical literature, and Congress have treated Rutledge's statement as authoritative". Liebman, 98 Colum. L. Rev. at 829. *See, e.g., Sioux Nation*, 448 U.S. at 392; Hart, 66 Harv. L. Rev. at 1373; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (citations omitted). Given that *Loving* announced the non-impairment principle in the context of a conflict between the executive and legislative branches, it follows *a fortiori* that the rule applies with even greater force in an interbranch collision involving the judicial branch, which is "beyond comparison the weakest" department, *Federalist No. 78* at 465-66, and thus requires, if possible, still more vigilance against encroachments by its coordinate branches.

When Congress skews the adversary process in its own favor, or sets up court proceedings where a fully equipped government lawyer is to do battle with a hamstrung lawyer, the legitimacy of the courts--of the "judicial power" itself--is at stake. Courts must "take care to speak and act in ways that allow people to accept" their decisions. *Casey*, 505 U.S. at 865 (1992). They must guard against perceptions they have presided over unjust proceedings, a perception that "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process". *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). "[T]he rule of law implies equality and justice in its application". *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). If courts are forced to decide cases where Congress has altered the balance between contending parties and placed a thumb on the scales of justice in favor of government--including the Federal government itself--a perception of injustice is inevitable.

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All the erroneous assumptions about the conduct of litigation inherent in the Government's interpretation, as well as all the harm to the courts and perversions of the adversary system it entails, would be avoided if we are correct that the Government's interpretation of the Appropriations Rider is wrong. (*See* Point III.)

But if the Government is right that the Rider broadly bars all contentions regarding welfare rules, regulations, or statutory provisions, and, indeed that Legal Services lawyers cannot even make constitutional or statutory *arguments* in support of a client's request for the "specific relief" of money or other welfare benefits, then the Appropriations Rider is an unconstitutional incursion on the Separate Powers of the Judicial Branch.

## II. APPLICATION OF THE GOVERNMENT'S CONSTRUCTION TO CASES IN THE STATE COURTS WOULD ALSO VIOLATE PRINCIPLES OF FEDERALISM.

State courts, like federal courts, are bound to uphold the Constitution of the United States and laws made in pursuance thereof. U.S. Const. Art. VI ("This Constitution . . . shall be the Supreme law of the land . . . and the Judges in every state shall be bound thereby"). *See Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring); *Steffel v. Thompson*, 415 U.S. 452, 482, n.3 (1974) (Rehnquist, J., concurring); Liebman, 98 Colum. L. Rev. at 701. State courts obviously also are vital to defining and upholding state constitutions, laws, and regulations.

Under the Government's interpretation of the Rider, even if a sovereign state believes the contours of its welfare system are best defined through full and free litigation in its state courts--even if the state legislature so decrees and state Governor so announces--Legal Services lawyers in those state courts still cannot make the arguments deemed appropriate by the entire mechanism of state government. Given the "inviolable sovereignty" of the states,[15] this Court should not presume Congress intended to work such an interference with state courts unless that intention is "unmistakably clear". *See*

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[15] *E.g., Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999) (quoting *The Federalist* No. 39, at 245 (James Madison)).

*Gregory v. Ashcroft*, 501 U.S. 452, 460-62 (1991). Obviously, the Rider fails for lack of such clarity.

## III. THE APPROPRIATIONS RIDER SHOULD NOT BE INTERPRETED TO BAR LEGAL SERVICES LAWYERS FROM CLAIMING--OR EVEN ARGUING--THAT A PARTICULAR WELFARE RULE, REGULATION, OR PROVISION IN A WELFARE STATUTE IS UNCONSTITUTIONAL OR CONTRARY TO STATUTORY LAW.

The Government's interpretation is wrong. It is inconsistent with the language of the Appropriations Rider itself. It would cause ludicrous and anomalous results in the courts.

Careful examination of the Rider as a whole reveals that--at most--it can be read to prohibit seeking certain broad-ranging structural, or policy-based remedies--*not* contentions that an individual welfare rule, regulation or provision in a statute is either unconstitutional or contrary to statutory law, including the governing welfare act itself. Moreover, the proviso on which the Government relies limits only the *type of relief* that may be sought. If the "specific relief" is for money or other welfare benefits, there is no bar on making constitutional or statutory arguments in support of that relief. Thus, the proper reading of the Rider is one that allows all claims that are not "effort[s] to reform" a welfare "system", and indeed authorizes all necessary and proper arguments on behalf of individual clients in suits for specific relief.

The error of the Government's interpretation is made even clearer by two bedrock legal principles of this Court's constitutional jurisprudence: *first,* statutes should, if possible, be construed to avoid constitutional questions, as well as conflicts with other statutes; *second*, Congress should not be assumed to have legislated to hamper courts' ability to decide cases within their jurisdiction, unless Congress' intent to do so is "clear". No such clear intent is manifested here.

**A. The Government's Interpretation Is Wrong.**

Public Law 104-134, passed by the 104th Congress in April 1996 as an "Appropriations Act", was said to be an Act "making appropriations for the Departments of Commerce, Justice and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1996, and for other purposes". Pub. L. No. 104-134, 110 Stat. 1321 (1996). The Legal Services Corporation (the "LSC") is among the myriad (89) departments, agencies, commissions, administrations, offices, divisions, councils, institutes, programs, funds and services for whom funds were appropriated by the Act.

Section 504 of the Appropriations Act placed substantive limitations on the kinds of legal activities that can be undertaken by persons or entities that receive LSC funds.

Subsection (a)(16) of Section 504 forbids any LSC funds to be provided to an entity or person that:

> "initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation".

In what follows, we refer to the language through "effort to reform a Federal or State welfare system" as the basic prohibition. The remainder is referred to as the proviso and its exception.

The Rider's basic prohibition is against an "*effort to reform a Federal or State welfare system*" by means of "litigation, lobbying, or rulemaking". Whatever these words mean, they certainly do not prevent a Legal Services lawyer

from contending that an individual rule, regulation or provision of a welfare statute is either:

(1) inconsistent with the governing welfare statute or another statute, or

(2) inconsistent with the Constitution.

Such arguments with regard to individual rules, regulations, or statutory provisions are (1) not directed toward "a welfare system", and (2) are not "effort[s] to reform". To the contrary, they are *efforts to assure compliance with the law.* Whatever is barred must be an "effort to reform" a Federal or State welfare "*system*". As the LSC's brief recognizes, this means "broad-ranging litigation". Br. of LSC at 2.[16] Thus, the basic prohibition does not forbid a claim on behalf of an individual client that a particular rule, regulation, or statutory provision is illegal or unconstitutional. Indeed, it could never be "reform" to require that a law conform to the Constitution; that is simply the basic prerequisite for all laws under the Supremacy Clause and *Marbury.*

Because the Rider is so limited to broad "effort[s] to reform" a welfare "system", the Government's interpretation is not saved by the proviso and exception to the proviso that follow the basic prohibition.

As a matter both of logic and conventions in the interpretation of statutes and other writings, the proviso/exception cannot pump substance into the basic provision that is not in the basic provision in the first place. *See* 2A *Sutherland Stat. Const.* § 47.08 (5th ed. 1991) (stating that the purpose of provisos is to restrict the effect of the existing statutory language to *less* than what its scope of operation *would be otherwise*); 73 Am. Jur. 2d *Statutes* § 318

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[16] That the word "litigation" in the basic provision is linked with "lobbying" and "rulemaking" further supports the conclusion that the basic prohibition is directed at policy-oriented changes that attempt to "reform" the welfare "system".

(1974) ("The natural and appropriate office of a proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which otherwise would be within its terms"); *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323, 350 (E.D. Pa. 1966) (provisos are "qualifiers, not nullifiers"); *State ex rel. Browne v. Hechler*, 476 N.E. 2d 559, 561 (W.Va. 1996) (same as *Sutherland*); *Sanzone v. Board of Police*, 592 A.2d 912, 918 (Conn. 1991) (provisos "restrict" scope of a statute); *Commerce Bank of Kansas City, N.A. v. Missouri Div. of Finance*, 762 S.W.2d 431, 436-37 (Mo. App. 1988) (same as *Sutherland*).

The basic prohibition forbids only "effort[s] to reform" a welfare "system"; the rules of construction above demonstrate that no proviso or exception can *add* conduct--such as making non-systemic arguments--that would not "otherwise be within its terms". These points alone should trump the Government's interpretation.[17]

In any event, though (as shown above) the Rider read as a whole cannot mean what the Government says it does, it is also true that the words of the proviso/exception *looked at alone* do not support the Government's interpretation. The language of the proviso/exception, looked at alone, shows that, whatever

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[17] The United States refers to the proviso and its exception as a "rule of construction". Br. of United States at 26. We agree to the extent that the proviso and exception should be read as inseparable from--and having no power to alter what is contained within--the basic prohibition against "effort[s] to reform" a welfare "system". Where we differ from the Government is that we do not agree that a lawyer's claim that a welfare rule, regulation or provision in a statute is unconstitutional or illegal is an "effort to reform" a welfare "system". We also differ on the meaning of the proviso/exception (when looked at alone). The Government says constitutional and statutory arguments never can be made; we say that such arguments can be made where the "specific relief" sought is for money or other welfare benefits.

might be barred, it is not making *particular arguments*; rather, what it may bar is seeking certain broad-ranging types of *relief*. Thus, a Legal Services lawyer whose requested *relief* is for money or other welfare benefits for the welfare client, is just as free as any other lawyer to *argue* that the client is entitled to that relief based upon some statutory or constitutional point.

The proviso/exception is, at most, barring the seeking of relief, other than specific welfare benefits such as cash benefits, job training or child care vouchers, for a client--for example, contending that a state's "welfare system" is so flawed that a court should supervise a welfare department, or seeking system-wide injunctive relief even without class certification, or arguing that a state constitution's social welfare provisions supersede welfare legislation entirely.[18]

The words "*amend* or otherwise challenge" in the proviso/exception support the conclusion--drawn from the words of the basic prohibition--that the Appropriations Rider is not designed to prevent a claim on behalf of an individual eligible client seeking to enforce governing law by showing a particular welfare rule, regulation or provision in a statute would be unconstitutional or illegal if it was construed to deny benefits. Consistent with the basic prohibition against wide-ranging, systemic reform, the proviso clarifies that what remains prohibited--even under the exception for specific relief--are challenges so broad-based to be tantamount to "amend[ing]" existing law.

Another point based upon the words of the proviso/exception arises from analyzing the Government's interpretation as applied separately to (i) statutory arguments, and (ii) constitutional arguments.

As to statutory arguments, whatever the words "amend or otherwise challenge" mean, they clearly should not prohibit a

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[18] Of course, this understanding accords with the meaning of the basic prohibition against "effort[s] to reform" a welfare "system".

contention that a challenged rule, regulation or statutory provision is inconsistent with the governing welfare statute or with another statute. Indeed, such arguments would be "an effort" to enforce (not to "amend or otherwise challenge") "existing law".

If one accepts (based on the clear language of the Rider) that arguments brought under the existing statutory law are permissible, can the Government still contend that a Legal Services lawyer is barred from claiming that the rule, regulation or provision in a statute relied upon by the welfare agency is inconsistent with the Constitution? This position would be wrong for all the reasons set forth above and much more.

First, as we show in Part B below, Congress' intent to achieve such a strange prohibition, singling out constitutional arguments as beyond the pale, must be "clear"; it certainly is not.

Second, the Government's interpretation would produce ludicrous and anomalous results in litigation. When faced with a potentially unconstitutional rule or regulation, a traditional argument to a court is that an adversary's position should be rejected so as to avoid a constitutional problem. Does the Rider permit such constitutional avoidance arguments? The Government has never said it does--and Legal Services lawyers cannot risk the funding of their organizations by gainsaying the Government's desire to limit criticism.[19] Such an interpretation by the Government would be just an extreme example of its error: arguments that by their very nature are intended to *assure* compliance with the Constitution itself are banned as "effort[s] to reform".

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[19] If, however, the Government announces that constitutional avoidance arguments are permitted, even though a contention that a challenged provision is in fact unconstitutional is barred, it would further illustrate the illogical and inappropriate contortions caused by the Government's interpretation of the Rider.

As shown above, the Government's construction is contrary to the language of the Rider.[20] The Government's erroneous construction is not saved by the LSC's final rule (*supra* note 2) for three reasons.

First, Congress did not expressly instruct the LSC to promulgate regulations pursuant to Section 504(a), and the regulations therefore are entitled to less deference under *Chevron v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), than regulations promulgated pursuant to such express instructions as appear elsewhere in the Rider. *E.g.*, Sec. 503(3)(b) (directing the agency to promulgate regulations to implement a competitive selection process).

Second, the agency's interpretation is not "reasonable", as required under *Chevron*, because its reading would be an "affront to common English usage." *Id.* at 860. The words "effort to reform a . . . system" do not connote in any way a claim that a particular provision is unconstitutional or illegal. Moreover, if Congress intended to depart so far from ordinary usage and use "litigation . . . involving an effort" to denote only *government* efforts, Congress could have so specified. *Cf. Pittston Coal Group. v. Sebben*, 488 U.S. 105, 112-115 (1988) (refusing to narrow term "criteria" in a statute to mean only specific criteria).

But that is not what Congress did. Instead, the Rider precludes lawyers from commencing litigation involving "an effort" to reform a welfare system, which clearly refers to efforts by the lawyer him-or-herself. Moreover, the

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[20] In evaluating the speech implications of the Government's construction, however, the decision below apparently accepted the Government's interpretation of the Rider. *E.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 769 (2d Cir. 1999). The proper construction of the Rider thus is squarely before the Court. (Indeed, it would be even if the decision below had not reached this question, under, *e.g.*, *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground")).

Government's interpretation would not be harmonious with the language of the proviso, which permits constitutional and statutory arguments in suits for specific relief such as money or welfare benefits.

Third--and most fundamentally--independent of the problems that the agency's interpretation creates under *Chevron* itself, *Chevron* cannot save an otherwise unconstitutional statutory construction. Even if two interpretations were equally possible under *Chevron*, which is not the case, *Ashwander*'s principle of constitutional avoidance nevertheless would direct this Court to choose the one free of constitutional defects. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (subjecting agency regulations to constitutional avoidance analysis); *American Trucking Assocs., Inc. v. EPA*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting) ("In other words, [after *Rust*], the constitutional avoidance canon trumps *Chevron* deference".).

### B. Under the Principles Set Forth by This Court in *Ashwander* and Related Cases, the Interpretation Given to the Appropriations Rider by the Government Should Be Rejected.

As we have shown above, the Government's interpretation of the Appropriations Rider is wrong; it conflicts with the language of the Rider itself. Nonetheless, should the Court determine a question of statutory construction exists, under *Ashwander* the statute should be construed, if possible, to avoid the numerous constitutional problems identified by this brief and the briefs of Respondents and other *amici*. For, "when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided". 297 U.S. at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 n.8 (1932)). *See also Gomez v. United States*, 490 U.S. 858, 864 (1989); *United States v.*

*National Treasury Employees Union*, 513 U.S. 454, 478 (1995).

It undoubtedly is "possible" (indeed, correct, as we have shown above) for the Court to construe the statute so as to avoid the "serious constitutional issues" presented by the Rider's violation of the Separation of Powers, the First Amendment, and principles of federalism. For that reason alone, this Court should reject the Government's interpretation and read the statute to avoid the serious constitutional problems that stem from the Government's construction.[21]

If *Ashwander* were not sufficient to doom the Government's interpretation (though it clearly is), the Government's construction would still be constitutionally suspect based on the Rider's lack of clarity in (as the Government would have it) singling out constitutional claims for suppression. Just as, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear", *Webster,* 486 U.S. at 603; *see also Weinberger*, 422 U.S. at 765, Congress should not lightly be assumed to have removed constitutional claims from judicial scrutiny by silencing--for all practical purposes--the lawyers who can bring them. The principle that a "serious constitutional question" arises in the absence of a judicial forum for "colorable" constitutional claims indicates that clear intent is required--as it should be--before Congress will be taken to have intruded upon the "province and duty" of the "weakest department". *Cf. Webster*, 486 U.S. at 603-04 (limiting the elimination of

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[21] In addition, the Court should reject the Government's construction of the Rider because it would cause conflicts with the ethical provisions of the LSC Act, as set out in the accompanying *amicus* brief of New York State Bar Association *et al.* and Brief of Respondents at 48-50. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (court should avoid conflict between statutes); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (same). This principle "applies with even greater force when the claimed repeal rests [as here] solely on an Appropriations Act". *TVA v. Hill*, 437 U.S. 153, 190 (1978).

review only to those claims specifically listed in the statute and narrowly tailored to its text); *Weinberger*, 422 U.S. at 762 (looking at "plain language" of statute for prohibition of claims).

## CONCLUSION

For the reasons stated, the Court should hold either (1) that the Appropriations Rider is unconstitutional on Separation of Powers and federalism grounds, as well as under the First Amendment; or (2) that the Rider does not prohibit Legal Services lawyers from making claims, or arguments, that a particular welfare rule, regulation or statutory provision violates the Constitution or statutory law.

Respectfully submitted,

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** As required by Sup. Ct. R. 37(6), we state that this brief was not authored by counsel for any party.

Nos. 99-603 and 99-960

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2000

JUL 19 2000

LEGAL SERVICES CORPORATION,

*Petitioner,*

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

CARMEN VELAZQUEZ, *et al.*,

*Respondents.*

ON WRITS OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE CENTER FOR CONSTITUTIONAL RIGHTS, IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. This case raises the question of the extent to which the government can use its funding power to limit the legal claims that lawyers can make on behalf of their indigent clients. Since its founding in 1920, the ACLU has been deeply involved in the struggle to obtain equal justice for the poor, from *Powell v. Alabama*, 287 U.S. 45 (1932), which established the first right to appointed counsel in criminal cases, to *Legal Aid Society of Hawaii v. Legal Services Corporation* (LSC), 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998), which challenged the 1996 congressional restrictions on LSC grantees that are central to this case as well. In addition, the ACLU represented plaintiffs in *Rust v. Sullivan*, 500 U.S. 173 (1991), which petitioners have cited as their principal authority throughout this litigation. The proper resolution of this case is, therefore, a matter of substantial concern to the ACLU and its members.

The National Legal Aid and Defender Association (NLADA), a nonprofit organization incorporated in the District of Columbia, is the largest national association dedicated to ensuring access to justice for the poor in the nation's civil and criminal justice system. NLADA has more

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

than 2000 members, including those legal aid programs funded by LSC. Each year, NLADA's civil program members funded by LSC represent thousands of welfare recipients in court and before agencies in matters directly relating to the administration of the welfare system. NLADA and its civil program members are profoundly troubled by Congress' effort to bar LSC-funded programs from challenging the validity of welfare laws and regulations on constitutional or other grounds. The practical effect of that restriction is to leave the poor served by LSC programs with no legal advocate to raise those claims on their behalf in large parts of the country where non-LSC funded programs do not exist and there are no *pro bono* counsel available who could provide such representation.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 48 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. NCAC educates the public and policy-makers about threats to free expression and works to create a more hospitable environment for laws, decisions and policies protective of free speech and democratic values. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The Center for Constitutional Rights is a progressive legal and educational organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution. The Center, which grew out of the Civil Rights Movement in the 1960s, has long been in the forefront of social and economic justice litigation. Three years ago, the Center represented a class of indigent elderly and disabled legal permanent residents in their challenge to the constitutionality of the provisions of the Personal Respon-

sibility and Work Opportunity Reconciliation Act of 1996 that barred eligibility for needs-based public assistance benefits on the basis of alienage. *See Abreu v. Callahan*, 971 F.Supp. 799 (S.D.N.Y. 1997). Last year, the Center served as an *amicus* to this Court in *Saenz v. Roe*, 526 U.S. 489 (1999), and argued that California's imposition of a residency requirement for public assistance recipients was unconstitutional. The Center strongly supports the federal funding of free legal representation for the indigent. But because the availability of public assistance benefits is of such vital importance to the indigent, the Center believes it is crucial that their attorneys have the freedom to challenge the constitutionality of welfare legislation.

## STATEMENT OF THE CASE

The Legal Services Corporation was created by Congress in 1974 to "provid[e] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. §2996b(a). As Congress noted in the original enabling Act, "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances," 42 U.S.C. §2996(1), and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel . . . ." 42 U.S.C. §2996(2). For the past quarter-century, LSC has pursued these goals by providing financial support to legal organizations around the country that represent indigent clients.

Many organizations that receive grants from LSC also receive financial support from other sources, both public and private. LSC, by contrast, receives its funding entirely from Congress as part of the annual appropriations process. In 1996, after a prolonged political battle, Congress substantially reduced the LSC budget while simultaneously imposing a

new set of restrictions on LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L.No. 104-134, 110 Stat 1321. The legislative record leaves little doubt that Congress was motivated more by ideology than by finances or administrative efficiency. For example, Senator Helms complained that Legal Services programs were "push[ing] social policies down the throats of local governments and citizens. 141 Cong.Rec. S8948 (daily ed. June 22, 1995). In a similar vein, Representative McCollum complained that Legal Services programs were undertaking "impact litigation in an attempt to socially engineer changes in our laws and rules." 141 Cong.Rec. E1220 (daily ed. June 9, 1995).

The restrictions adopted by Congress in 1996, and reenacted every year since, reflect a laundry list of disfavored causes, clients, and claims.[2] But, the specific prohibition at issue is unique even in the context of this broadly worded statute. It expressly authorizes the continued representation of individual welfare clients; yet, it expressly deprives those clients of the ability to challenge the constitutionality of existing welfare laws. *See* §504(a)(16).[3] Moreover, this restriction, along with all the others, applies to the use of non-

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[2] The restrictions are set out in §504 of the 1996 budget law, and summarized in the decision below. *See Velazquez v. Legal Services Corp.*, 164 F.3d 757, 760 n.1 (2d Cir. 1999). Among other things, LSC grantees are forbidden from representing prisoners or aliens (with certain minor exceptions), forbidden from participating in litigation involving abortion or reapportionment, and forbidden from filing a class action or seeking attorney's fees.

[3] To put this prohibition in concrete terms, suppose that Congress adopted a law that made it more difficult for single women to obtain welfare benefits than for single men. A women denied benefits under this law could challenge the finding that she was, in fact, a single woman. But she could not challenge the law itself as a form of gender discrimination while represented by an LSC grantee.

LSC funds as well as LSC funds. Even the former, Congress wrote, "may not be expended for any purpose prohibited by this Act." *See* §504(d)(2)(b).

In its initial set of implementing regulations, LSC extended the reach of the 1996 restrictions to so-called "interrelated organizations," which LSC defined by reference to an earlier regulation as any organization subject to the "control" of an LSC grantee. That expansive interpretation was quickly subject to a preliminary injunction in a parallel litigation. *See Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F.Supp. 1402 (D.Haw. 1997). In response, LSC issued a new set of regulations designed to mirror the separation requirements that this Court had previously upheld for Title X family planning programs in *Rust v. Sullivan*, 500 U.S. 173 (1991). Under these revised regulations, an LSC grantee may establish a relationship with an "affiliate" organization that is not bound by the congressional restrictions so long as the two organizations maintain their "program integrity." The regulations further provide that the indicia of "program integrity" include separate facilities, separate personnel, and separate accounting.[4]

Plaintiffs brought suit challenging many (but not all) of the statutory restrictions and implementing regulations as unconstitutional. Although recognizing that the revised regulations might prove unduly burdensome in practice, and thus subject to an as-applied challenge at some later point, the district court concluded that they were facially valid under *Rust* and, on that basis, denied plaintiffs' motion for a preliminary injunction. *Velazquez v. Legal Services Corp.*, 985 F.Supp. 323 (E.D.N.Y. 1997).

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[4] The evolution of these regulations is more fully described in the Second Circuit's opinion. 164 F.3d at 761-62.

On appeal, the Second Circuit affirmed the district court's holding in all respects, except one. In an opinion written by Judge Leval, the court of appeals ruled that the provision permitting "representation of a client seeking a welfare benefit . . . only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits" is inescapably viewpoint based and, therefore, unconstitutional. 164 F.3d at 769. As the majority explained:

> It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint.

*Id.* at 769-70.

Both sides sought review in this Court. Only the government's petition was granted, however. Accordingly, the sole question now before the Court is the constitutionality of this viewpoint-based restriction on legal advocacy by LSC grantees that applies even to speech that is privately funded.

## SUMMARY OF ARGUMENT

The issue in this case is whether Congress may constitutionally override the professional judgment of lawyers employed in LSC-funded programs by prohibiting them from challenging the constitutionality of existing welfare laws, even if the client's best interest would be served by raising the constitutional claim, and even if the lawyer's work on the case is entirely supported by non-LSC funds. The Second Circuit correctly held that this restriction was impermissibly viewpoint based in violation of the First Amendment.

Although the government has broad discretion over how its money is spent, it may not use its funding power to "aim at the suppression of dangerous ideas." *Speiser v. Randall*, 357 U.S. 513, 519 (1958). Thus, this Court has consistently recognized a critical distinction between cases in which the government itself is deemed the speaker and cases in which the government provides a subsidy to enable private speakers to deliver their own messages. In the first instance, the government is not required to be evenhanded and may promote its own policy preferences and viewpoints which is how this Court has characterized *Rust v. Sullivan*, 500 U.S. 173 (1991). In the latter instance, the government may not skew the terms of the debate by favoring some views over others. *See, e.g., Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

A central question in this case, therefore, is whether Legal Services lawyers who are suing the government can plausibly be described as speaking on behalf of the government or whether, like all other lawyers, they are ethically bound to speak on behalf of their clients. The answer to that question is clear. Indeed, Congress thought so as well when it first established LSC and expressly stipulated that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. §2996.

Petitioners do not quarrel with the rule against viewpoint discrimination. Rather, they contend that it is irrelevant for two reasons, neither of which is persuasive. First, petitioners suggest that the requirement of viewpoint neutrality applies only when government funding has been used to create a public forum, which petitioners argue does not exist here. This Court, however, has never treated the neutrality doctrine as limited to "a public forum in the traditional

sense of the term." *Board of Regents of the University of Wisconsin System v. Southworth*, __ U.S. __, 68 U.S.L.W. 4220, 4224 (March 22, 2000). To the contrary, this Court has long stressed the importance of viewpoint neutrality in diverse settings, including a series of academic freedom cases. Citing those cases in *Rust,* this Court emphasized the importance of viewpoint neutrality whenever the government tries to regulate a "traditional sphere of free expression." 500 U.S. at 200. The government's attempt to restrict courtroom advocacy by Legal Services lawyers fits easily within that category.

Second, petitioners try to salvage the challenged restriction by arguing that it is a categorical limitation on the kinds of cases that LSC-funded lawyers can handle rather than a viewpoint-based restriction on the claims that can be advanced. The problem with that argument is that LSC-funded lawyers are not in fact barred from representing welfare clients in litigation, they have simply been told that they may not argue in the course of their representation that existing welfare laws are unconstitutional. There is no doubt that Congress knew how to write a categorical restriction if it had wanted to -- for example, LSC-funded lawyers are prohibited from handling reapportionment cases. But, whatever the validity of such categorical restrictions may be, this restriction is not one.

Petitioners' reliance on *Rust* is therefore misplaced on several grounds. Unlike *Rust,* the government has not defined welfare litigation as somehow outside the scope of an LSC-funded program; it has never identified any discrete message it is seeking to convey through its ban on constitutional challenges; and it is impossible to characterize a lawyer suing the government as a spokesperson for the government's message, even assuming the government had one. Thus, while *amici* believe that *Rust* was wrongly decided, we also believe it is readily distinguishable.

Finally, because this is a different case than *Rust*, the "separation requirements" that LSC adapted from *Rust* violate the unconstitutional conditions doctrine by imposing an unjustified burden on the use of private funds to support constitutionally protected expression. While the government has an undeniable interest in ensuring that its funds are spent for their intended purpose, accounting procedures that have been in place for many years are more than adequate to accomplish that goal. Accordingly, even if the government could permissibly prohibit the use of its own money to challenge existing welfare laws, this restriction goes too far and cannot be sustained.

## ARGUMENT

### I. THE FIRST AMENDMENT PROHIBITS USING PUBLIC SUBSIDIES TO RESTRICT THE VIEWS EXPRESSED BY PRIVATE SPEAKERS WHO SPEAK ON THEIR OWN BEHALF RATHER THAN ON BEHALF OF THE GOVERNMENT

This case requires the Court once again to address the issue of government funded expression and to decide what, if any, constraints the First Amendment imposes when Congress uses the power of the purse to dictate the views that can be expressed by the recipients of public monies. Controversies involving government funded expression have, in the past, spawned considerable disagreement, both within the Court and among academic commentators. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819; *Rust v. Sullivan*, 500 U.S. 173; and *Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982). *See also* Redish and Kessler, "Government Subsidies and Free Expression," 80 Minn.L.Rev. 543 (1996); Cole, "Beyond Unconstitutional Conditions: Charting

Spheres of Neutrality in Government-Funded Speech," 67 N.Y.U. L.Rev. 675 (1992); Fiss, "State Activism and State Censorship," 100 Yale L.J. 2087 (1991); Shiffrin, "Government Speech," 27 U.C.L.A. L.Rev. 565 (1980).

Nevertheless, there is a fundamental constitutional divide that emerges from this Court's case law. That constitutional fault line turns on the very basic question of who is speaking for whom. On the one hand are those cases in which the government enlists a private speaker to deliver the government's message. This Court has characterized *Rust* as such a case *See Rosenberger*, 515 U.S. at 833. Under these circumstances, the Court has held that the government may insist that the speaker stay "on message."

On the other hand are those cases in which the government has not contracted with a spokesperson but has instead created a program to facilitate the expression of private views, epitomized most recently by the Court's decision in *Rosenberger*. Often, but not always, the cases in this second category have been analyzed in terms of the public forum doctrine. But on other occasions, the Court has talked more generally about institutions and relationships that remain uniquely dedicated to the free and unfettered exchange of ideas, even when they receive government subsidies and support. *E.g.*, *Southworth*, 68 U.S.L.W. at 4224. Public universities serve as the paradigm but not the only example of such institutions and relationships.

The critical feature in all of the cases in this second category is that the speaker is not in fact acting as an agent of the government, and is not perceived as acting as an agent of the government. Consequently, any effort by the government to claim an agency relationship as a means of controlling the viewpoints expressed by the private speaker would violate important constitutional norms, from academic

freedom to the due process and associational safeguards surrounding the attorney-client relationship.

In order to succeed on this appeal, the government and LSC must essentially argue that a Legal Services lawyer representing a client in litigation against the government is more properly characterized as a spokesperson for the government than a spokesperson for the client, merely by virtue of working in an office that is partially supported by government funds. Simply to state the proposition is sufficient to refute it. The Second Circuit was therefore correct in holding that a rule prohibiting Legal Services lawyers from challenging a welfare law on behalf of a welfare client is an unconstitutional form of viewpoint discrimination.

### A. Like All Lawyers, Legal Services Lawyers Speak On Behalf Of Their Clients During Litigation; They Do Not Speak On Behalf Of The Government, Especially When Suing The Government, Even If They Are Supported In Part By Government Funds

There are plainly circumstances where the government has a message to convey and where it provides funding to convey that message. In such circumstances, the government may properly be regarded as the "speaker" and, as the speaker, the government is free to express its preferred position without giving equal weight to countervailing views. As this Court pointed out in *Rust*: "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism or Fascism." 500 U.S. at 194 (citations omitted). The reason that is true is that the government in that circumstance is acting as "speaker." More specifically, Congress is using public monies to convey a discrete message

shaped by the government's own policy preferences. As the *Rosenberger* Court observed: "[G]overnment [is permitted] to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . [for] when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." 515 U.S. at 833.

Conversely, there are other circumstances when the government funds communicative relationships or when it creates or supports institutions devoted to discourse and expression where it is well recognized that those engaged in expression are not conveying the government's message but are, instead, conveying their own views. This Court's opinion in *Rosenberger* supports this distinction. After discussing the proposition that the government as "speaker" must remain free to support its own policy positions, the *Rosenberger* Court was careful to note that "it does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize the transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834.

The most common situation where the government provides financial support for communication by private speakers occurs when a state or municipality creates or subsidizes a public forum or a limited forum for individual expression. There is a long line of cases holding that in regulating access to a public forum the government cannot engage even in content-discrimination, and that when administering a limited forum government can establish categorical restrictions that define the nature of the forum but cannot engage

in viewpoint discrimination within the categories of appropriate expression.[5]

These principles were emphatically reaffirmed in *Rosenberger*, where this Court cited *Police Department v. Mosley*, 408 U.S. 92, 96 (1972), in support of the proposition that "[i]t is axiomatic that the government may not regulate speech based upon its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 829. In addition, the *Rosenberger* Court highlighted the special First Amendment concerns that arise when the government discriminates against speech based not only on content, but on viewpoint. Citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), the *Rosenberger* Court emphasized, in strong and unequivocal terms, that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." 515 U.S. at 829. Thus, even in a publicly funded program, like *Rosenberger*, "[t]he government must abstain from regulating speech when the . . . opinion or perspective of the speaker is the rationale for the restriction." *Id.*, citing *Perry Ed. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983).

Indeed, the fundamental premise of this Court's public forum cases, at least since *Hague v. CIO*, 307 U.S. 496 (1939), is that while the speakers in a public forum may be using public facilities or public subsidies to communicate their messages, the messages they are communicating are

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[5] Like the Court in *Southworth*, we begin with the public forum cases because they provide "a close analogy" and the "controlling" legal standard, 68 U.S.L.W. at 4224, not because they define the limits of the neutrality doctrine, as petitioners erroneously suggest. *See* Point IB, *supra*.

their own and not the government's. Government efforts to manipulate these private messages therefore violate the First Amendment, whether they are accomplished directly through a scheme of sanctions, or indirectly through the manipulation of public support. In this regard, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Capital Square Review Bd. v. Pinette*, 515 U.S. 753 (1995), and *Rosenberger* are particularly instructive.

Each of these cases involved the constitutionality of restrictions directed against religious expression. In each of these cases, the government defended its restrictions upon the claim that if the government were to provide financial support for religious expression it would violate the Establishment Clause. And, in each of these cases this Court rejected the government's defense. It did so because the communication that took place within the public forum was reasonably understood as the expression of private individuals or organizations; consequently, the government was not understood to be endorsing the religious expression at issue, even if it created the forum or otherwise provided financial support that allowed the communication to take place. *Lamb's Chapel*, 508 U.S. at 395 ("under the circumstances of the case there would have been no realistic danger that the community would think that the [School] District was endorsing religion or any particular creed . . . ."); *Pinette*, 515 U.S. 760 (["Pinette's] religious display in Capitol Square was private expression"); *Rosenberger*, 515 U.S. at 834-35 ("The distinction between the University's own favored message and the private speech of students is evident in the case before us . . . The University declares that the student groups eligible for . . . support are not the University's agents, are not subject to its control, and are not its responsibility"). As a result, in each of these cases this Court concluded that the government restrictions amounted

to impermissible viewpoint discrimination in violation of the First Amendment.[6]

Only a few weeks ago, in *Santa Fe Independent School Dist. v. Doe*, __ U.S. __, 68 U.S.L.W. 4525 (June 19, 2000), this Court reaffirmed the distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise clauses protect." *Id.* at 4529, citing *Board of Ed. of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990)(emphasis in original). At issue in *Santa Fe* was a school district's policy of permitting a student, elected by the student body, to conduct a prayer prior to high school football games. This Court concluded that the policy violated the Establishment Clause because the history and context of the school district's policy, coupled with its reliance upon a majority vote of the student body, left the Court "[un]persuaded that the pre-game invocations should be regarded as 'private speech.'" 68 U.S. L.W. at 4529.

If anything, the relevant history is even less ambiguous here, although it points in the opposite direction. The enabling Act that created LSC in 1974 carefully stipulated that "the Legal Service Program must be kept free from the influence of or use by it of political pressure." 42 U.S.C. §2996. That statutory commitment remains in full force today, and compels the conclusion that Legal Services lawyers are in fact engaged in *private* speech, not *government*

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[6] In *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998), the Court strongly suggested that the government is barred from engaging in "invidious viewpoint discrimination" even when awarding artistic grants, which this Court characterized as more akin to a prize than a public forum. This is so, at least in part, because the private artistic expression supported by the NEA is not generally understood as the government's speech.

speech, when representing clients. Indeed, the dangers inherent in viewpoint discrimination are especially apparent in the context of this case where the government may be an adversary party in litigation it is funding, and thus possesses an inescapable self-interest in restricting the terms of the legal debate.

For that reason, among others, Congress explicitly recognized when it established LSC that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. §2996(6).[7] As this Court well knows, those standards generally stipulate that the decision to waive or assert a claim on behalf of a client must rest solely on the lawyer's "professional judgment," and not be dictated by a government funder or anyone else. *See, e.g.*, 22 N.Y.C.R.R. §1200.26 (DR5-107); 22 N.Y.C.R.R. §1200.32 (DR 7-101). In this regard, Legal Services lawyers are no different than all other lawyers. They act and speak as agents of their clients, not as agents of the government.

To be sure, the government has every right to say that it wants its own money spent on certain kinds of cases. For example, the government need not support bankruptcy cases if it chooses not to, just as it may limit its support of a public defender's office to criminal representation. But within the category of cases it has chosen to fund, the government may not dictate the arguments that a Legal Services lawyer makes on behalf of a client, especially in litigation

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[7] *See also* 42 U.S.C. §2996e(b)(1)(B)(3)(LSC "shall not . . . interfere with any attorney in carrying out his professional responsibilities . . ."); 42 U.S.C. §2996f(a)(1)(LSC must protect "the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients").

where the government is an adversary. The doctrine of viewpoint neutrality erects a constitutional barrier against such manipulative funding schemes. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 519 (1958)(tax policies may not be designed to "aim at the suppression of dangerous ideas").[8]

### B. The First Amendment Prohibition Against The Use of Government Funding To Impose Viewpoint-Based Restrictions Is Not Limited To Circumstances Where The Government Subsidizes A Public Forum

Petitioner Legal Services Corporation seeks to avoid the force of this conclusion by suggesting that, in the government funding context, the First Amendment prohibition against viewpoint discrimination is limited to public forum cases, and that this case does not involve government funding of a public forum or even a limited forum. LSC Brief at 26-28. Petitioner, however, misconceives the controlling constitutional rule. The prohibition against viewpoint discrimination is not limited to circumstances where government subsidizes a forum for communication. It applies, as well, to other sorts of communicative relationships and institutions funded or subsidized by the government. One such example is provided by our public universities.

Indeed, when state-funded universities first developed in this country, scholars feared that politicians would use the power of the purse to dictate the content of curriculum. Thus, Professor Arthur Lovejoy, one of the founders of the American Association of University Professors (AAUP) and one of the principal authors of the AAUP's 1915 Report on Academic Freedom wrote, some years later, that "the dis-

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[8] In our view, the effort to restrict lawyer speech in a viewpoint-based way also raises significant due process issues, although they have not been the focus of this litigation.

tinctive social function of the scholar's trade cannot be fulfilled if those who pay the piper are permitted to call the tune." Lovejoy, "Professional Association or Trade Union?", 24 AAUP Bull. 409, 414 (1938), quoted in Rabban, "Does Academic Freedom Limit Faculty Autonomy?", 66 Tex.L.Rev. 1405, 1413 (1988). Largely in response to this concern, principles of academic freedom were developed to insulate the lectures and writings of faculty members from influence by funding sources, whether such sources were private or governmental. *See* Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," 66 Tex.L.Rev. 1265, 1277 (1988).

These principles acquired constitutional recognition in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). *Sweezy* arose out of an investigation begun by the Attorney General of New Hampshire into the subject matter of a lecture delivered at a state university by a faculty scholar. In holding the investigation unconstitutional, both the plurality opinion of Chief Justice Warren and the concurring opinion of Justice Frankfurter discussed the importance of academic freedom. Justice Frankfurter, in particular, warned against the "grave harm resulting from governmental intrusion into the life of a university . . . [and in] compelling a [scholar] to discuss the contents of his lecture . . . ." *Id.* at 261.

Subsequent cases have reinforced the notion that academics have a First Amendment right to remain free from governmental intrusion into scholarly discourse even if the government is funding the academic enterprise. For example, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court held that the First Amendment protected faculty members at a state university from dismissal based on their supposedly "seditious utterances," or because they refused to sign a certification stating that they did not belong to the Communist Party. In ruling in favor of the faculty, this Court announced that "[o]ur Nation is deeply committed to

safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

This concern for government-imposed orthodoxy within the classroom was subsequently explored in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). In that case, the Court examined an inquiry by the EEOC into the peer review process employed by a university in making tenure decisions. The university attempted to resist disclosure of its employment processes arguing, in part, that such disclosure would compromise academic freedom. This Court rejected the university's argument but, nonetheless, recognized the application of academic freedom principles where "government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it." *Id.* at 197 (emphasis in original). After reviewing its decisions in *Sweezy* and *Keyishian*, the Court observed: "When in those cases, the Court spoke of 'academic freedom' and the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulation." 493 U.S. at 197. The *EEOC* Court also made clear that its reference to content regulation reflected a more specific concern that government would endeavor to "direct . . . university discourse toward or away from particular subjects or points of view." *Id.* at 198.

Thus, the political branches of government may decide to fund a university, or not. They may sponsor a law school and not a medical school. Within the context of a government-sponsored academic program, however, the scholars and academics must remain free to pursue their individual academic expression without intrusion by the politicians. For it is well understood that when scholars engage in aca-

demic discourse, even in a public university, they are conveying their own ideas and not those of the state.

A similar understanding applies to Legal Services lawyers who sue the government on behalf of their clients, even if all or part of their salaries are paid by the government. Indeed, this Court has already held as much. In *Polk County v. Dodson*, 454 U.S. 312 (1981), an individual convicted at a state criminal trial subsequently brought suit under 42 U.S.C. §1983 alleging that a public defender who was a full-time employee of the county had failed to provide adequate representation. In holding that the suit should be dismissed, this Court reasoned that lawyers representing indigent defendants in criminal cases are not agents of the state even though they are paid with public funds. Rather, they owe a duty of "undivided loyalty" to their clients. As the Court also recognized, there is a corresponding "constitutional obligation of the state to respect the professional independence of the public defenders whom it engages." *Id.* at 321-22.

The academic freedom analogy is apt, as well, in terms of the role that universities play within our constitutional scheme as institutions devoted to open discourse and the free exchange of ideas, which can only function in an environment that respects "the autonomy and independence of the speakers within them . . . ." Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech." 67 N.Y.U. L.Rev. 675, 711 (1992). As Justice Frankfurter noted in *Sweezy*, "[a] university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest." 354 U.S. at 263.[9] In *Rust*, therefore, this Court pointedly linked public

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[9] Elaborating on this principle, Justice Frankfurter wrote: "[I]t is the business of the university to provide that atmosphere which is most con-

(continued...)

streets and public universities as "traditional sphere[s] of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by" the First Amendment. 500 U.S. at 200.

Under our concept of the adversary system, litigation likewise functions as a "traditional sphere of free expression." To be sure, all lawyers are subject to certain restrictions on their courtroom advocacy. Arguments before this Court are limited to thirty minutes per side. The admissibility of trial court testimony is subject to the rules of evidence. But the ability of litigation to serve as a search for truth is severely compromised when, as here, the government attempts to impose viewpoint-based limits on what one litigant can say that were transparently crafted to insulate the government's position from a potentially fatal, constitutional attack.

Seen in these terms, this case is distinguishable from *Rust*. This Court has said that the health care professionals in *Rust* were speaking on behalf of the government, not on behalf of themselves, when they functioned within the Title X program. *See Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194, 196-200). Whether that characterization of Title X is correct or not, *see* n.10, *supra*, a lawyer representing an indigent client in a suit against the government cannot possibly be characterized in similar terms as a government spokesperson.

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[9] (...continued)
ducive to speculation, experimentation and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 263. (citation omitted).

Moreover, the *Rust* Court described the Title X program as limited to the provision of family planning services and information. "Postconception medical care," including both prenatal care and abortion-related services, were deemed equally "outside the scope of the federally funded program." 500 U.S. at 193-94, 200. Here, by contrast, the government funds legal services lawyers to represent clients seeking to establish their eligibility for welfare benefits. A claim that might establish such eligibility by invalidating a rule under which the client was denied benefits is in no sense "outside the scope" of the program. Such a claim serves the program's goals of ensuring that eligible clients receive the benefits to which they are legally entitled.

In short, this case is simply not governed by *Rust*. Rather, it is governed by the more general set of First Amendment principles that apply when government has decided to fund or subsidize a communicative relationship or institution devoted to discourse and expression, and where it is well understood that those engaged in such expression are not conveying the government's message. Accordingly, in this case, unlike *Rust*, Congress cannot employ the power of the purse to dictate the content of the expression.[10]

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[10] While we firmly believe that this case is distinguishable from *Rust*, *amici* also believe that the ruling in *Rust* can and should be reconsidered if this Court concludes otherwise. In particular, we believe the challenged Title X provisions in *Rust* were plainly viewpoint based, and should have been struck down on that ground alone. In addition, we disagree with the Court's conclusion in *Rust* that the physicians working in a Title X program either view themselves, or are viewed by their patients, as mouthpieces for the government. Doctors treating patients, like lawyers representing plaintiffs or professors delivering lectures, should be shielded from government imposed restrictions on their speech whether they are working in a publicly funded setting or not. At the very least, *Rust* should not be extended beyond its particular facts.

### C. The Restrictions At Issue Amount To Viewpoint Discrimination That Burdens The Attorney-Client Relationship And The Right Of Clients To Effective And Independent Advocacy

In an effort to avoid the line of precedent holding viewpoint discrimination violative of the First Amendment, petitioners seek to characterize the restrictions at issue as categorical limitations that curtail the sorts of cases that LSC-funded lawyers can pursue on behalf of clients, but do not restrict what those lawyers can say to their clients or what claims clients can advance through lawyers not associated with the Legal Services Corporation. LSC Brief at 29; U.S. Brief at 35-37. LSC carries this argument further by suggesting that since clients remain free to assert any claims they wish -- even if some claims cannot be advanced by lawyers associated with the Legal Services Corporation -- the restrictions at issue here impose no significant burden upon rights of free expression or association. LSC Brief at 32.

These arguments are misconceived for several reasons. First, the suggestion that the restrictions at issue do not burden First Amendment rights because Legal Services lawyers remain free to talk to their clients about all of their legal options, and Legal Services clients remain free to retain non-LSC lawyers to challenge the constitutionality of welfare enactments, is both unrealistic and analytically flawed.

The suggestion that indigent clients have open access to the marketplace and numerous options to choose from when they seek a lawyer to pursue constitutional claims on their behalf is overstated. As a practical matter, many indigent clients represented by LSC-funded lawyers have no other option at all, a fact that Congress acknowledged when it created LSC. *See* p.3, *infra*. Furthermore, petitioners' argument discounts the fact that the First Amendment right of

access to the courts embraces the right to establish a relationship with counsel who can provide a "guiding hand" in the litigation process, *Polk*, 454 U.S. at 322; that "implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control," *id.*; and that the lawyer-client relationship requires that lawyers remain free to pursue claims in the best interests of their clients. *See generally Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1977).

As this Court recently observed, "[w]e have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party v. Jones*, __ U.S. __, 68 U.S.L.W. 4604, 4608 (June 26, 2000). Moreover, "it is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening speech and laws banning speech is but a matter of degree." *United States v. Playboy Entertainment Group, Inc.*, __ U.S. __, 68 U.S.L.W. 4409, 4412 (May 22, 2000).

Petitioners' effort to characterize the restriction at issue as categorical rather than as viewpoint based is similarly misplaced. Lawyers in offices receiving LSC funds are permitted under the statute to represent a category of clients broadly described as indigent individuals eligible for welfare benefits. Moreover, such lawyers are permitted, under the statute, to initiate litigation on behalf of these clients in order to secure the benefits to which such clients are entitled. During the course of that approved litigation, LSC-funded lawyers can concede the constitutionality of existing welfare laws (if they so choose), but they cannot challenge the constitutionality of existing welfare laws (even if it would be in their client's best interest to do so). Such a restriction cannot fairly be described as a categorical limita-

tion. Instead, it amounts to viewpoint discrimination in violation of well-settled First Amendment principles.

## II. THE RESTRICTIONS AT ISSUE IMPOSE AN UNNECESSARY AND UNJUSTIFIED BURDEN ON PRIVATELY FUNDED SPEECH

Even if, *arguendo*, the restrictions at issue were regarded as categorical rather than viewpoint based, and even if, *arguendo*, the government could therefore limit the claims that LSC lawyers could advance with federal dollars, the restrictions imposed upon the use of private funding would nonetheless violate the unconstitutional conditions doctrine.

In a series of cases this Court has closely scrutinized efforts by the government to condition public funding and public benefits upon the waiver of First Amendment rights of expression. Viewing the cases together and in context, certain basic principles emerge. First, government regulations that restrict or prohibit the use of private funds to support the exercise of constitutionally protected rights of expression are presumptively unconstitutional.[11] Second, if the government seeks to condition a public benefit -- including public funds -- upon the waiver of constitutional rights of expression, such conditions are impermissible unless narrowly tailored in the pursuit of substantial state interests.

Accordingly, in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), this Court ruled that nonprofit organizations incorporated under §501(c)(3) of the federal tax code could be required to engage in lobbying through an affiliate

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[11] There can be little dispute that the right to petition the government through associational activity, including both litigation and lobbying, is constitutionally protected. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978).

organization incorporated under §501(c)(4) that did not receive the benefit of tax-deductible contributions. The Court began its analysis by noting that both tax-exempt status and tax-deductible contributions are forms of government subsidies. 461 U.S. at 544. Proceeding from the premise that Congress is under no obligation to subsidize the exercise of constitutional rights, the Court then concluded that Congress had permissibly chosen "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.*

Creation of a lobbying affiliate was narrowly tailored to serve the government's interest. Indeed, there probably was no other way to serve the government's interest given the nature of the tax subsidy involved. Even so, the Court was careful to point out that the "IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.* at 544 n.6. In other words, IRS did not enforce the separation requirements that LSC has imposed in this case.

One year later, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a statute that went considerably further than *Regan* by banning editorializing by any educational television station that received a federal grant from the Corporation for Public Broadcasting. As it had done in *Regan*, the Court recognized the First Amendment implications of the government's policy and carefully scrutinized its asserted justifications.[12] "[T]he manifest imprecision of the ban," the Court stated, "reveals that its proscription is not sufficiently tailored to the harms it seeks to

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[12] It is noteworthy that the Court applied heightened scrutiny even when dealing with broadcast, which traditionally has been subject to greater regulation than other First Amendment media. 468 U.S. at 380-81.

prevent to justify its substantial interference with broadcasters' speech." *Id.* at 392.

As understood by this Court, the Title X program at issue in *Rust* was fundamentally different from the subsidy programs at issue in either *Regan* or *League of Women Voters*. As the Court subsequently explained in *Rosenberger*, 515 U.S. at 833, the government in *Rust* "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." In the government's view, therefore, the segregation requirement in *Rust* was designed to avoid having the private message of a health care professional confused with the message that the government was seeking to impart. Thus, the requirement of separate facilities and separate personnel upheld in *Rust* ultimately rests on the principle, more fully articulated in *Rosenberger*, that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.*

The "separation requirements" at issue in this case were modeled upon those upheld in *Rust*. But regulation by imitation is hardly a basis for ensuring the narrow tailoring that the Constitution requires where, as here, First Amendment rights are at stake. This case is not *Rust*. Legal Services lawyers do not represent the government; in the context of this case, they represent indigent clients in welfare litigation against the government. Because these lawyers are not delivering the government's message, there is no risk that their speech will create confusion about the government's position on the validity of existing welfare laws. To the contrary, the government's message will presumably be delivered, clearly and unambiguously, by its own legal advocate.

Nor are the "separation requirements" justified by a risk of inappropriate commingling of funds. Separate accounting procedures are fully adequate to ensure that LSC funds are spent only for their intended purpose. Many LSC grantees have long received supplemental funding from non-LSC sources, and LSC has long required strict accounting procedures to segregate the funds.[13] Yet, petitioners have never made any claim during the course of this litigation that current accounting procedures are inadequate, or that serious problems have developed in the past with the commingling of funds. *See League of Women Voters*, 468 U.S. at 390-91 (speculative concerns are insufficient to justify restrictions on privately funded speech).

The First Amendment does not permit the government to adopt a broad prophylactic rule when its legitimate interests can be satisfied through more narrowly tailored means. *See, e.g., NAACP v. Button*, 371 U.S. at 438.

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[13] This accounting requirement is continued in the new regulations. *See* 42 C.F.R. §1610.9; *see also* 45 C.F.R. §1630.3.

## CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals should be affirmed.

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